122-132

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 479. 216

EDWARD WARREN AND VERNON K. WARREN, HIS WIFE, AND JOHN S. KENNEDY, AND MARY E. KENNEDY, HIS WIFE, APPELLANTS,

vs.

FRANK S. MOODY AND RICHARD C. McLESTER, ASSIGNEES IN BANKRUPTCY OF BAUGH KENNEDY AND COMPANY AND JOHN S. KENNEDY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED NOVEMBER 26, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 479.

EDWARD WARREN AND VERNON K. WARREN, HIS WIFE, AND JOHN S. KENNEDY, AND MARY E. KENNEDY, HIS WIFE, APPELLANTS,

vs.

FRANK S. MOODY AND RICHARD C. McLESTER, ASSIGNEES IN BANKRUPTCY OF BAUGH KENNEDY AND COMPANY, AND JOHN S. KENNEDY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court, U. S.	1	1
Caption	1	1
Complaint	1	1
Exhibit A—Deed of John S. and Mary E. Kennedy to Vernon L. Warren, Dec. 31, 1866	11	4
Summons	14	5
Marshal's return	16	6
Motion for alias subpœnas	17	7
Alias summons	19	7
Marshal's return	21	8
Answer of J. S. and Mary E. Kennedy	22	8
Exhibit K—Schedule of property, &c., owned by Jno. S. Kennedy, Dec. 31, 1866	34	12
Decree *pro confesso*	37	13
Answer of Edward and Vernon L. Warren	39	14
Replication	40	15

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original	Print.
Interrogatories to Walker *et al.*	43	15
Notice as to interrogatories	48	17
Commission to take testimony	50	18
Testimony of Robt. Greenlee	55	19
Cornelius D. Walker	61	21
Calvin U. Silliman	66	23
Agreement of counsel to publish testimony	71	24
as to facts	72	25
Note of testimony	72	25
Decree of sale	74	25
Application for writ of error	77	26
Order allowing appeal	78	27
Appeal bond	79	27
Clerk's certificate	81	28
Order allowing amendment to complaint	83	28
Amendment to complaint	84	29
Motion to strike amendment from files	85	29
Affidavit of Wm. S. Thorington	87	30
Order overruling motion to strike, &c.	89	31
Final decree	93	32
Petition for appeal	95	32
Order allowing appeal	96	32
Bond	97	33
Citation	102	34
Service of citation	103	35
Clerk's certificate	104	35

1 November Term, 1881.

At a circuit court of the United States for the fifth judicial circuit and middle district of Alabama, begun and holden at Montgomery, Alabama, on the first Monday of November, it being the 7th day of said month, in the year of our Lord one thousand eight hundred and eighty-one—present and presiding, the Hon. Don A. Pardee, circuit judge—the following proceedings were had:

Transcript of Record & Proceedings from U. S. Dis't Court, Mid. Dis't of Ala.

In the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy.

To the Hon. John Bruce, judge of the district court aforesaid, sitting in bankruptcy. In equity:

Frank S. Moody and Richard C. McLester, both of whom are citizens of the State of Alabama and reside in the city of Tuscaloosa, bring this, their bill of complaint, against John S. Kennedy 2 and his wife, Mary E. Kennedy, and Edward Warren and his wife, Vernon L. Warren, all of whom are resident citizens of the State of Alabama, and of the city and county of Tuscaloosa, and middle district aforesaid; and thereupon your orators complain and say:

First. That on, to wit, the 7th day of July, 1876, the said John S. Kennedy, as one of the partners in the late firm of Baugh, Kennedy and Co., and as an individual, was duly adjudged and declared a bankrupt by this honorable court on a petition filed by said late firm, and each of the individual members thereof, in this court on the 1st day of July, 1876. That shortly thereafter, to wit, on the 28th of July, A. D. 1876, your orators were duly appointed assignees in bankruptcy of the estate, rights, and credits of said late firm, and of each of the individual members thereof, including the said John S. Kennedy, and duly qualified in that behalf. That on the 11th day of August, A. D. 1876, your orators, as such assignees, received from the register in bankruptcy for said court a deed of assignment of all the estate, rights, and credits of the said bankrupts, including the individual estate, rights, and credits of the said John S. 3 Kennedy, and entered upon the administration of said estates according to the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March the 2nd, 1867, and the amendments thereto, and are still administering such trust in said court.

Second. Orators further aver, on information and belief, that the said John S. Kennedy, prior to his adjudication of bankruptcy as aforesaid, to wit, on the 31st day of December, 1866, together with his said wife, Mary E. Kennedy, was seized and possessed of the following-described real estate, to wit: The east half of the southeast quarter of fractional section 7, fractional section eight, fractional section seventeen; the east half of the east half of section eighteen; thirty-four acres off the east side of the west half of the southeast quarter of section eighteen; north half of section twenty, all in township twenty-one, range one west, containing one thousand and fifty-six acres, more or less, and lying and being in the county of Sumter, in said State; and being so seized and possessed, the 4 said John S. Kennedy and his wife, Mary E. Kennedy, without any other consideration than that of natural love and affection, did, on the day and year last aforesaid, undertake to convey to said Vernon L. Warren, who is their daughter, the property hereinbefore described, but said deed was not acknowledged by said grantors until, to wit, on the 7th day of October (1867), eighteen hundred and sixty-seven, and was not recorded until the 29th day of March, 1872; and there being no attesting witnesses to said deed, orators are advised and believe, and so state, that it did not become operative as a deed of conveyance (as against existing creditors) for any purpose until the date of such recording, to wit, on the 29th March, 1872, or at least until the same was acknowledged, to wit, on the 7th day of October, 1867; a copy of which said deed is hereto attached, marked Exhibit A, and made a part of this bill of complaint.

Third. And orators further aver that at the time of the making of the deed aforesaid the said John S. Kennedy and his wife, the said Mary E. Kennedy, and the said Edward Warren and his wife, the said Vernon E. Warren, were residing in the 5 city and county of Tuscaloosa, in the State of Alabama, and have continuously resided in said city ever since the date of said deed, and are now each and all of them residing in said city last aforesaid, and that neither of them have since the date of said deed resided in the county of Sumter, where the lands hereinbefore described are situated, and that neither of them have been in the actual possession of said lands since the date of the deed aforesaid. That said deed was acknowledged before Moses McGuire, the judge of probate of the county of Tuscaloosa.

Fourth. Orators further aver, on information and belief, that at the time of the execution of said deed of conveyance as aforesaid the said John S. Kennedy owed debts exceeding the sum of, to wit, two thousand dollars, which said debts were returned by the said John S. Kennedy in his schedule in bankruptcy filed in this court, and have been filed and proven in the bankruptcy proceedings in the matter of said Kennedy's estate; all of which appears from the 6 record and proceedings in said cause, which are here referred to. And orators herein set forth the said indebtedness of the said John S. Kennedy as follows, that is to say: He was indebted as guardian, duly appointed by the probate court of Lauderdale county, to one Martha E. Harrison, then a minor, who has since intermarried with Jasper L. Gower, and is now a married woman, residing with her said husband in Lauderdale county, Alabama, in the sum of seven hundred and seventy-nine $\frac{42}{100}$ dollars, which said claim has been proved in your honor's court, and is now on file among the proofs as a claim against said bankrupt. That said John S. Kennedy was also indebted before and at the time of executing said conveyance as aforesaid, as guardian as aforesaid, duly appointed as aforesaid, to Wiley A. Harrison, of Lauderdale county, Ala., then a

minor, in the sum of fifteen hundred and ninety $\frac{42}{100}$ dollars, for
monies, goods, and credits, which came to his hands as such guardian,
and never paid over or in any manner accounted for by him, as com-
plainants are informed and believe and so charge. Said claim
7 has been proved by said Wiley A. Harrison and allowed, and is
on file in your honor's court as a subsisting claim against said
bankrupt, and is reported as such in the schedule of said John S. Ken-
nedy. And the said John S. Kennedy was before and at the time he
executed said conveyance aforesaid, as orators are informed and believe
and so charge, indebted to Mary A. Ingram, executrix of Moses Ingram,
deceased, residing in Lauderdale county, Ala., in the sum of seven-
teen hundred and sixty-five $\frac{16}{100}$ dollars, due by note dated 13th Oc-
tober, 1868; and orators aver that said claim is reported by said
John S. Kennedy in his schedule on page 42, and, upon information
and belief, they aver that the same was so made as a renewal note for
a claim or debt contracted by him with said claimant in 1859. Said
claim is on file in your honor's court on the file of proofs No. 117,
but is proved as a claim against the estate of Baugh, Kennedy &
Co., a firm that was then composed of said John S. Kennedy, Rich-
ard B. Baugh, William H. Hays, and Jesse G. W. Leftwick,
8 each of whom have also been duly declared bankrupts in
your honor's court (except Jesse G. W. Leftwick), and said
John S. Kennedy, as complainants are informed and believe and so
charge, was indebted as trustee before and at the time he executed
said conveyance as aforesaid to M. J. Herbert, of Wayland Springs,
Lawrence county, Tennessee, in the sum of one thousand $\frac{61}{100}$ dol-
lars, contracted in the year 1860. Said claim is not proved by said
claimant, but is reported in the schedule of the said John S. Kennedy.
And said John S. Kennedy was before and at the time he executed
said conveyance as aforesaid, as appears by his said schedules, on
page 44 thereof, indebted to Martha Coyn, of Florence, Ala., in the
sum of one thousand and seventy $\frac{8}{100}$ dollars, contracted in 1859.
Said schedule recites that the note for said sum is executed by him
and by R. B. Baugh, Wm. H. Hays, and Jesse G. W. Leftwick. Said
debt is not yet proved, and orators aver, upon information and belief,
that the same is still due and unpaid. And the said John S.
9 Kennedy, bankrupt as aforesaid, as a member of said firm of
Baugh, Kennedy & Co., then composed of said John S. Ken-
nedy, R. B. Baugh, Wm. H. Hays, and Jesse G. W. Leftwick, was on
said several dates aforesaid indebted to R. M. Kilbourne, of Lauder-
dale county, Ala., in the sum of two hundred and thirty-six $\frac{85}{100}$ dol-
lars, due by due bill for said sum dated December 1st, 1866. Said
claim is credited with a payment of nine $\frac{30}{100}$ dollars on the 1st of
September, A. D. 1873, and is proved by said Kilbourn for the sum
of four hundred and five dollars as a subsisting claim, and is on file
in your honor's court among the claims against the estate of said
bankrupt.

Fifth. Orators further aver that they are advised and believe, and so state, that said deed, being wholly voluntary, is under the laws of Alabama absolutely void as against the debts hereinabove mentioned and as against your orators, who, as such assignees, represent said debts for the purposes of this suit.

The premises considered, your orators pray your honor for writs of subpœna to issue to the said John S. Kennedy and Mary E. Kennedy and the said Edward Warren and Vernon L. Warren; 10 requiring them and each of them, within the time and in the manner prescribed by law, to answer, plead, or demur to this bill of complaint.

And orators further pray that the said deed be declared null and void and that the same be set aside and vacated by the decree of this court, and that said lands be sold by your orators and the proceeds thereof be administered by them as part of the estate of the said John S. Kennedy, in bankruptcy, and for all such other and further or different and general relief as all the pleadings and proofs may warrant or as to your honor may seem meet.

RICHARD C. McLESTER,
FRANK S. MOODY, *Assignees.*

J. M. VAN HOOSE AND
W. L. BRAGG,
Sol'rs for Above-named Plaintiffs.

STATE OF ALABAMA, *County of Tuscaloosa:*

Before me, Joseph W. Burke, a register in bankruptcy, this day personally appeared the above-named complainants, R. C. McLester and Frank S. Moody, who, being duly sworn, doth 11 state on oath that the statements and averments of the foregoing bill when made as upon knowledge are true, and when made upon information, advice, and belief they verily believe them to be true.

RICH'D McLESTER,
FRANK S. MOODY, *Assignees.*

Subscribed and sworn to before me this 23rd day of July, A. D. 1878.

JOSEPH W. BURKE,
Register in Bankruptcy.

EXHIBIT A.

John S. and Mary E. Kennedy to Vernon L. Warren:

In consideration of the love and affection we bear to our daughter, Vernon L. Warren, and the sum of ten dollars, we, John S. Kennedy and Mary E. Kennedy, do hereby grant, bargain, sell, and convey under the said Vernon L. Warren, and to her heirs and assigns, forever, the following tract of land in Sumter county, Ala., viz., the east half of the southeast quarter of fractional section 7, 12 fractional section eight, fractional section seventeen, the east half of the east half of section eighteen, thirty-four acres off the east side of the west half of southeast quarter sec. eighteen, north half of sec. twenty, all in township twenty-one, range one west, containing one thousand and fifty-six acres, more or less. And we, the said John S. and Mary E. Kennedy, do hereby covenant with the said Vernon L. Warren that we are seized of an estate in fee-simple in said land; that said land is free from incumbrance, and that we will warrant and defend the title of the said Vernon L. Warren, her heirs and assigns, forever.

The foregoing conveyance is intended as an advancement to our said daughter.

In testimony whereof we have hereunto set our hands and seals this 31st day of December, 1866.

JNO. S. KENNEDY. [SEAL.]
MARY E. KENNEDY. [SEAL.]

THE STATE OF ALABAMA, *Tuscaloosa County:*

13 I, Moses McGuire, judge of probate for said county, certify that Jno. S. and Mary E. Kennedy, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand the 7th day of October, A. D. 1867.

MOSES McGUIRE,
Judge of Probate, T. C.

Received in office and recorded March 29th, 1872, stamped with fifty cents U. S. rev. stamps.

J. A. ABRAHAM, *Judge.*

THE STATE OF ALABAMA, *Sumter County:*

I, J. A. Abrahams, judge of probate for said county, hereby certify that the foregoing is a true and correct transcript of a deed made by Jno. S. Kennedy and Mary E. Kennedy to Vernon L. Warren as the same appears on record in this office.

Given under my hand this the 22nd day of December, A. D. 1876.

J. A. ABRAHAMS,
Judge of Probate.

Filed July 25th, 1878.

J. W. DIMMICK, *Clerk.*

14 *Summons.*

UNITED STATES OF AMERICA, *Middle District of Alabama:*

RICHARD C. McLESTER and FRANK S. MOODY, as Assignees of Baugh, Kennedy & Co., & of John S. Kennedy, Bankrupts, Compl'ts, *and* JOHN S. KENNEDY, MARY E. KENNEDY, Edward Warren, & Vernon L. Warren, Defendants.	In Equity. Bankruptcy.

The President of the United States of America to John S. Kennedy, Mary E. Kennedy, Edward Warren, and Vernon L. Warren, who are citizens of the State of Alabama, Greeting:

You are hereby commanded and strictly enjoined that laying all

other matters aside, and notwithstanding any other excuse, you and each of you personally be and appear before the judge of the district court of the United States for the middle district of Alabama,
15 at the clerk's office of the said court in the city of Montgomery, at rules to be had on the first Monday in September next, to answer a bill of complaint exhibited against you in the said court by Rich'd C. McLester and Frank S. Moody, as assignees in bankruptcy of the estate and effects of Baugh, Kennedy, & Co., and of John S. Kennedy, bankrupts, who are citizens of the State of Alabama, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars. And have then and there this writ.

To the marshal of the United States for the middle district of Alabama to execute.

Witness the Hon. John Bruce, judge of the district court of the United States, on the 25th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and third.

J. W. DIMMICK,
16 *Clerk U. S. Dist. Court, Mid. Dist. of Alabama.*

J. M. VAN HOOSE AND W. L. BRAGG,
Complainant's Solicitors.

NOTE.—The defendants are required and hereby notified to enter appearance in the above-entitled cause in the clerk's office of said court on or before the rule day next ensuing, to wit, the second day of September, 1878, or the bill may be taken *pro confesso* against them.

J. W. DIMMICK, *Clerk.*

J. M. VAN HOOSE & W. L. BRAGG,
Complainant's Solicitors.

Received in office this 25th day of July, 1878, and I hereby deputize H. H. Brown to execute the within writ.

GEORGE TURNER,
U. S. Marshal.

The within summons served on the defendants, John S. Kennedy and Mary E. Kennedy, at Tuscaloosa, on the 26th day of August, 1878, by delivering to and leaving with them a copy thereof,
17 and at the same time showing them the original with the seal of the court attached. The defendants, Edward Warren and Vernon L. Warren, not found.

Dated Aug. 27, 1878.

GEORGE TURNER,
U. S. Marshal.
By H. H. BROWN,
Special Dep'y.

Returned and filed 6th September, 1878.

J. W. DIMMICK, *Clerk.*

Motion for Alias Writs of Subpœna to Edward Warren & Vernon Warren, his Wife.

In the District Court of the United States for the Middle District of Ala., sitting as a Court of Equity. In Bankruptcy.

RICHARD C. McLESTER & FRANK S. MOODY, Assignee, &c.,
vs.
EDWARD WARREN, VERNON L. WARREN, his Wife, *et als.*, Defendants.

Motion is hereby made in this cause for alias writs of subpœna to be issued and directed to the said Edward Warren and 18 Vernon Warren, his wife, requiring each of them to appear and plead, answer or demur to the bill in this cause, as required by the prayer of said bill and the rules of this court. This motion is predicated upon a return of "not found" upon the original subpœnas to the said Edward Warren and Vernon Warren, his wife, on file in this cause.

J. M. VAN HOOSE,
W. L. BRAGG,
Sol'rs for Plaintiffs.

To J. W. Dimmick, Esq., clerk U. S. dist. court, mid. dist. of Ala.

Filed Feb. 26, 1879.

J. W. DIMMICK, *Clerk.*

19 *Alias Summons to Warren & Wife.*

UNITED STATES OF AMERICA, *Middle District of Alabama:*

RICHARD C. McLESTER and FRANK S. MOODY, as Assignees, &c., of Baugh, Kennedy & Co. and of John S. Kennedy, Bankrupts, Complainants,
and
JOHN S. KENNEDY, MARY E. KENNEDY, EDWARD WARREN, & VERNON L. WARREN.
} In Equity.

The President of the United States of America to Edward Warren & Vernon L. Warren, who are citizens of the State of Alabama, Greeting:

You are hereby commanded & strictly enjoined that, laying all other matters aside, and notwithstanding any other, you and each of you personally be and appear before the judge of the district court of the United States for the middle district of Alabama, at the clerk's office of the said court, in the city of Montgomery, at 20 rules to be held on the first Monday in April next, to answer a bill of complaint exhibited against you in said court by Richard C. McLester and Frank S. Moody, as assignees in bankruptcy of Baugh, Kennedy & Co. and of John S. Kennedy, who are citizens of the State of Alabama, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars. And have there — then this writ.

To the marshal of the United States for the middle district of Alabama to execute.

Witness the Hon. John Bruce, judge of the district court of the United States, on the 26th day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[L. S.] J. W. DIMMICK,
Clerk U. S. District Court, Mid. Dist. of Alabama.

21 J. M. VAN HOOSE & W. L. BRAGG,
Complainant's Solicitors.

NOTE.—The defendants are required and hereby notified to enter appearance in the above-entitled cause, in the clerk's office of said court, on or before the rule day next ensuing, to wit, the seventh day of April, 1879, or the bill may be taken *pro confesso* against them.

J. W. DIMMICK, *Clerk.*

J. M. VAN HOOSE & W. L. BRAGG,
Complainant's Solicitors.

Received in office this 26th day of Feb'ry, 1879, and I hereby deputize Fitz Burton to execute the within writ.

GEORGE TURNER,
U. S. Marshal.

The within summons served on the defendants, Edward Warren and Vernon L. Warren, his wife, at Tuscaloosa, Ala., on the 20th day of March, 1879, by delivering to and leaving with each of them a copy thereof, and at the same time showing them the original, with the seal of the court attached.

22 Dated March 20th, 1879.

GEORGE TURNER,
U. S. Marshal,
By FITZ BURTON,
Dep'y Marshal.

Returned and filed Mar. 24, 1879.

J. W. DIMMICK, *Clerk.*

Answer of J. S. Kennedy and Mary E. Kennedy.

In the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy. In Equity.

FRANK S. MOODY & R. C. MCLESTER, Assignees,
vs.
VERNON L. WARREN, EDWARD WARREN, JOHN S. KENNEDY, & MARY E. Kennedy.

Bill filed July 25th, 1878.

The joint and several answer of Jno. S. Kennedy and his wife, Mary E. Kennedy, defendants, to the bill of complaint of Frank S. Moody & Richard C. McLester, assignees, so filed against them and others in the district court of the U. S. for the
23 middle district of Alabama, as aforesaid, on the 25th July, 1878.

These defendants, saving and reserving to themselves all and all manner of advantage of exception that may be had or taken to the many errors, uncertainties, and other imperfections in said bill of complaint contained, for answer thereto, or to so much and such parts thereof as these defendants are advised it is material for them to make answer unto, *these defendants*, on knowledge, information, and belief, answer and say:

1st. They believe it to be true, and therefore admit, that respondent, John S. Kennedy, was duly adjudged and declared a bankrupt at the time and in the manner stated by complainants, and that complainants were duly appointed assignees in bankruptcy of the estates, rights, and credits of the late firm of Baugh, Kennedy & Co., and of each of the individuals members thereof, including respondent, Kennedy, and that they duly qualified in that behalf, as stated, and that they entered upon the administration
24 of said estate, according to the provisions of the act of Congress.

2d. They admit that on the 31st of December, 1866, these respondents were seized and possessed of the lands described in complainants' said bill, containing one thousand [and] fifty-six acres, situated in the county of Sumter, in the said State of Alabama; and they admit [that] on the said 31st Dec., 1866, they did convey the said lands to their daughter, Vernon L. Warren, thus admitting that love and affection for their said daughter was part of the consideration for said conveyance; but they deny that it was the sole consideration, and aver that the sum of ten dollars was also paid as part of the consideration, as stated in the deed of conveyance. The original is here referred to as Exhibit D, and will be produced on the trial of this cause as part of the testimony in this case. The deed was not acknowledged or recorded till the times respect-
25 ively stated by compl'ts' bill, as will appear from the deed itself, nor had it two attesting witnesses.

3rd. They admit that at the time of making said deed & continuously from that time to the present day these respondents and the

said codefendants, Edward Warren and Vernon L. Warren, resided in the city of Tuscaloosa, Alabama, and not in the county of Sumter; but these respondents aver that their codefendants were married in said city of Tuscaloosa on the 20th day of December, 1866, and that shortly thereafter, viz., on the 31st of December, 1866, respondents executed said conveyance and delivered it to their said daughter on the very day the same bears date. And these respondents aver that their codefendants took immediate and actual possession of said lands described in said deed; that the said Edward Warren, as husband of said Vernon L., rented said lands for the year 1867, the renting taking effect Jan. 1st, 1867; and
26 respondents aver that the said Edward Warren has had the sole control and management of said lands, as agent and husband of his said wife, paying taxes thereon, directing and superintending the repairs, and receiving the entire rent thereof for his said wife from the date of said deed, viz., Dec. 31, 1866, to the present day, and he and his said wife are still in the actual possession of said lands; and respondents therefore deny the allegation in said bill, that neither of them have been in the actual possession of said lands since the date of said deed.

4th. Respondent, Jno. S. Kennedy, admits that at the time of the execution of said deed (31st Dec., 1866) he was, and still is, indebted to Wiley A. Harrison, as his guardian, as stated, in about the sum of fifteen hundred and ninety dollars; and also as guardian he was & still is indebted to Martha E. Gower (formerly Harrison)
27 in about the sum of seven hundred and seventy-nine $\frac{49}{100}$ dollars; and he also admits that at the time he was, and still is, indebted to Mrs. Martha A. Herbert, of Lawrence Co., Tenn., as trustee, in about the sum of one thousand dollars; and respondent, Jno. S. Kennedy, avers that these debts were all the debts of any moment he owed at the date of said deed on his own individual account, amounting to nearly thirty-four hundred dollars.

And respondent states that these debts above named were substantially all the debts he owned at the date of his bankruptcy, on his own private account. All the other debts in his schedule were recent*ly* debts, or debts as adm'r, in which the late firm of Baugh, Kennedy & Co. had all the time had and used the funds, and none of them used by the respondent.

As a member of the old firm of Baugh, Kennedy & Co.,
28 which owned and operated Lauderdale Cotton Mills before the war, and up to Nov., 1863, which were burned by the Federal army, which said firm was, as stated, composed of R. B. Baugh, Wm. H. Hays, Jesse G. W. Leftwick, & this respondent, and jointly with said parties, this respondent was, by a firm note, indebted to said Mary A. Ingram, ex'x, as stated, in about the sum of seventeen hundred and sixty-five dollars, and also by the note of said firm to Mrs. Martha A. Koger in about the sum of one thousand and seventy dollars, and also, by firm note as aforesaid, to R. M. Kilburn in about the sum of two hundred and and thirty-six dollars, said indebtedness also existed at the time of making of said deed.

But respondent avers that said last-named firm debts were, and still are, primarily a charge on the firm assets of said old firm of Baugh, Kennedy & Co., and he avers that the said firm owned at that time, viz., Dec. 31st, 1866, and for many years since, viz.,
29 over six years, a large and valuable real property in said
county of Lauderdale, where said firm creditors then and still reside, consisting of the old factory site of said Lauderdale Cotton Mills, and about 1,300 acres of valuable land attached, located on Shoal creek, where there is a highly valuable water power sufficient to run 20,000 spindles. It has still in full operation a fine and valuable corn and wheat grist-mill, several valuable dwelling-houses, and the brick and debris of the large burnt cotton mills. And respondent avers that said property at the time said deed was made, was very valuable and worth at least $12,000, and that his former partner sold ¼ interest therein about the year 1872 to said Russel Kilburn for twenty-five hundred dollars, and this respondent has several times since then refused to take that sum for his fourth
30 interest in said factory site property. Respondent's interest
in said factory site is still unsold and liable to pay said firm debts. Respondent charges that said parties have stood by ever since the war, say over 13 years, and permitted one partner after another to dispose of his interest in said firm property, whilst respondent has left his interest still liable to pay said firm debts, and they cannot in equity & good conscience cause respondent's private property — for any part thereof, much less upon property given and sold in good faith to his said daughter in Dec., 1866.

5th. Respondents, on information and belief, deny that said deed was wholly voluntary, because they say there is a valuable consideration stated in deed which was paid at the time of delivery. They admit that the moving consideration was love and affection, and submit the question whether, when the consideration is part
31 valuable and part good, the deed is or is not voluntary. But
if this hon. court should hold that the said deed is a voluntary deed, then these respondents deny the same is void as against complainants or against the creditors named in said bill, because they say that to make even a voluntary conveyance void it must be shown that it was concocted in fraud, and that the transfer made was done with the intent to delay, hinder, or defraud creditors at the time it was made, and that it necessarily did at that time hinder, delay, and defraud creditors. And these respondents deny that said deed was made with the intent or that it necessarily did hinder, delay, or defraud said creditors or any other creditors.

They aver that at the time of making said conveyance, viz., on the 31st Dec., 1866, they were in prosperous circumstances, & possessed of ample means to pay all debts, and were able to with-
32 draw the value of said donation from their estate without the
least hazard to their creditors. They aver that they owed in their individual capacity at that time very little money. The said Martha A. Herbert, Wiley E. Harrison, & Martha E. Gower, formerly Harrison, being their chief and almost their only individual creditors. Respondent Kennedy had during the late war ¼ interest

in said Lauderdale Cotton Mills & lands and one-eighth ($\frac{1}{8}$) interest in the cotton mills of the Tuscaloosa Cotton Factory, and his dividend from each before they were destroyed by the Federal army were very large and valuable, and he was thus enabled to purchase and did purchase during the war, besides a large number of slaves and Confederate bonds, several tracts of land; and about one thousand bales of cotton, and that after the war, although much of the cotton was burned and stolen, yet his share exceeded or
33 amounted at least to about seven hundred bales of cotton, so that at the time of making said deed, v. 1., respondent, Kennedy, owned in his own right, free from all liens or incumbrances, the real estate minus & choses in action mentioned in schedule hereto attached, marked K, and made part of this answer, amounting in all in value at that time to about the sum of ——.

And they aver that, with the exception of the lands described in the State of Mississippi & monies invested in Louisville, Ky., all of said property was in the State of Ala., readily and conveniently acceptable to their creditors. Respondent Kennedy was never sued for an individual debt, nor even gave any incumbrance on his property, until some twelve months before his failure, when he gave a mortgage on some of his property to raise money for Baugh, Kennedy & Co., and a mortgage on some 5 lots in Louisville to secure a surety debt for E. W. & L. P. Kennedy.

34 Respondent Kennedy would long since have paid the individual debts named, but the 1st debt to Mrs. M. A. Herbert was so fixed by will that Mrs. H. could only use the interest during her life, and at her death, without heirs (she is childless), it is to go back to other parties, and his said wards, the Harrisons, were under age until three or four years past and could not lawfully receive the money.

J. S. KENNEDY,
MARY E. KENNEDY,
By WATTS & SON,
Their Attorneys.

EXHIBIT K.

Schedule of real and personal property & choses in action of Jno. S. Kennedy, owned Dec. 31st, 1866, and valued of that date.

Property in Alabama.

1st. Plantation, about 800 acres, in town 1, range 10 west, in Lauderdale Co., on Shoal creek, subdivided and sold about 1870 or 1871—

35 400 acres to Aaron Clemons for	3,000
200 " to Henry Clemons "	1,200
200 acres to Jno. R. Stutts for	800
2nd tract of 400 acres in s'd county, town 1, range 9, sold to Calvin Butler for	1,200
House & lot of 10 acres, former residence in Florence, Ala., sold to Cornine	4,000

House & lot in Florence, Ala., sold to B. Wooten	800
2 lots adjoining, 38 acres, sold to O. S. Kennedy, since subdivided and built on by parties	1,000
One-half of sale notes and effects of H. & J. S. Kennedy, collected since the war	3,000
17th (child's part) estate H. Kennedy	1,500
Notes (2) due J. S. K. from s'd estate	2,000
Notes for cash loaned O. S. Kennedy	4,000
Cash put in firm of Tapp, Kennedy & Walsh, in wholesale dry goods, Sept., 1865	20,000
Cash put in firm of Baugh, Kennedy & Co., to build the cotton mills sold by compl't	32,000
	75,000
36 House & lot, residence in Tuscaloosa then, Dec. 31, 1866, value at 4,000, present value	1,800
⅛ interest in burnt factory site, & brick & buildings in Tuscaloosa, say	1,000
⅓ interest in 120 Bear Heaver	300

Property in Mississippi.

660 acres land (Ellis tract), near West Point, sold at auction in 1871 or '72 for	11,000
⅓ interest in 1,200 acres in — Co., Miss., 50 acres cleared, & several frame houses, sold by Jacob Thompson before the war for 12,000; value these at, say	1,000
⅓ interest in 1,000 acres, same Co., sold before war for $10,000	800
Mules, wagons, farming utensils on plantation near West Point	1,000

Filed Apr. 21, 1879.

J. W. DIMMICK, *Clerk.*

37 *Decree, Pro Confesso, against Edward Warren & Vernon L Warren.*

In the District Court of the United States for the Middle District of Alabama. Bankrupt Docket on the Equity Side. May Term, 1879.

RICHARD C. MCLESTER & FRANK S. MOODY, as Assignees, &c.,
vs.
JOHN S. KENNEDY *et als.*

This cause came on to be heard on this day on the motion of complainants for a decree, *pro confesso*, against the defendants, Edward Warren and his wife, the said Vernon L. Warren; and it appearing to the court that a summons was duly issued by the clerk of this court under the order of this court on, to wit, the 26th day of February, A. D. 1879, and was on the same day placed in the hands of the marshal for said district, and was by him duly served and executed on the said Edward Warren and Vernon L. Warren 38 on the 20th day of March, A. D. 1879, by leaving a copy thereof with each of said defendants; and it further appearing to the court that the said defendants have each failed to enter an appearance in said cause and to answer, plead, or demur to said bill in the time prescribed by law, it is ordered, adjudged, and decreed that the said bill of complaint be; and the same is hereby, in all things held and taken as confessed as against the said defendants, Edward Warren and Vernon L. Warren.

July 26, 1879.

JOHN BRUCE, *Judge.*

Filed the 26th day of July, A. D. 1879.

J. W. DIMMICK, *Clerk.*

39 *Answer of Edward Warren and Vernon L. Warren.*

District Court of the United States for the Middle District of Alabama.

FRANK S. MOODY & R. C. McLESTER, Assignees, &c.,
vs.
VERNON L. WARREN, EDWARD WARREN, JNO. S. KENNEDY, & MARY E. KENNEDY.

The joint answer of Vernon L. Warren & Edward Warren to the bill of complaint filed in this case.

These defendants have read the answer filed in this case by their codefendants, John S. Kennedy and Mary E. Kennedy, and they say that the facts in said answer stated are true, and they adopt the said answer as their answer in this case, and they plead the facts in said answer set forth as a bar to the suit of the complainants against these defendants, and they pray for all the benefit of the de- 40 fences and prayers in the said answer relied on and set forth, but they do not plead the statute of limitations unless that defense is sufficiently set up in the said answer of Kennedy & wife.

WATTS AND SONS,
For Defendants.

We agree that the within answer of Vernon L. Warren and Edward Warren may be filed, and that the decree *pro confesso* against them in the within cause may be set aside as of this date.

August 6th, 1879.

J. M. VAN HOOSE &
W. L. BRAGG,
Sol'rs for Moody & McLester, Assignees.

Filed August 6, A. D. 1879, at 2 o'clock p. m.

J. W. DIMMICK, *Clerk.*

Replication of Compl'ts to Answer of Def'ts.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

41 MOODY and MCLESTER
vs.
EDWARD WARREN, VERNON L. WARREN, *et al.*

On the equity docket in bankruptcy.

The replication of complainants to the answers of the defendants, John S. Kennedy, Mary E. Kennedy, Edward Warren, and Vernon L. Warren.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other
42 matter or thing whatsoever in the said answers contained material or effectual in law to be replied unto and not herein and hereby well and truly replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are, and will be, ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

BRAGG AND THORINGTON,
Sol's for Compl'ts.

Filed Feb. 18, 1880.

J. W. DIMMICK, *Clerk.*

43 *Interrogatories to Cornelius D. Walker, Calvin U. Silliman, & Robert Greenlee, Witnesses on Behalf of Plaintiffs.*

Pending in the United States District Court for the Middle District of Alabama, sitting as a Court of Bankruptcy. In Equity.

FRANK S. MOODY & RICHARD C. MCLESTER, as Assignees, &c., of Baugh, Kennedy & Co., Bankrupts, Pl'ffs,
vs.
JOHN S. KENNEDY & MARY E. KENNEDY, his Wife, and EDWARD WARREN & VERNON L. WARREN, his Wife, Def'ts.
No. 146.

Direct interrogatories to be propounded to Cornelius D. Walker, Calvin U. Silliman, and Robert Greenlee, witnesses examined by and on behalf of the plaintiffs in the above cause, each of which witnesses reside in the county of Sumter, in the State of Alabama.

Direct Int'y 1st to each of said witnesses. Where do you
44 each reside, in what county and State, and about how long

respectively, have each of you resided in the county and State where you now reside? What is the age of each of you? In what business, profession, or occupation, if any, are each of you engaged, and about how long have each of you been engaged in such business, profession, or occupation?

Direct Int'y 2 to each of said witnesses. Do you or either of you know a tract of land, situated in Sumter county, in the State of Alabama, near the town of Gainesville, known as the Warren plantation, and more particularly described as follows, to wit: The east half of the southeast quarter of fractional section seven (7), fractional section eight (8), fractional section seventeen, the east half of the east
half of section eighteen, thirty-four acres off the east side of
45 the west half of the southeast quarter of section eighteen, the
north half of section twenty, all in township twenty-one, range one west, containing one thousand and fifty-six acres, more or less? If yea, how long have each of you known said tract of land?

Direct Int'y 3 to each of said witnesses. Do you, or either of you, know about what the cash market value of said tract of land was on or about the thirty-first day of December, in the year 1866? If yea, state what in your opinion was such value of said tract of land on or about the date last above mentioned, and state also the facts and circumstances and knowledge upon which you each predicate your opinions.

Direct Int'y 4 to each of said witnesses. Do you, or either of you,
know about what the cash maket value of said tract of land
46 was on or about the seventh day of October, in the year 1867?
If yea, state in your opinion what that value was at that time, and the facts, circumstances, and knowledge upon which you predicate this opinion.

Direct Int'y 5 to each of said witnesses. About what amount of said land, if any, was cleared land and in a state of condition for cultivation at each of the periods above enquired about respectively; what improvement, if any, in the way of houses and fences were on said lands at each of the periods above enquired about; describe, if you know, the quality and character of the soil of said lands; to what kind of agricultural productions, if any, was said land adapted at each of the periods above enquired about; how was said land situated with reference to the conveniences of public roads, railroads,
navigable streams, and markets at each of the periods above
47 enquired about; about what amount of said land, if any, was
fertile at each of the periods above enquired about, and about what amount of said land was not fertile at each of the periods above enquired about?

Direct Int'y 6 to each of said witnesses. Who was in possession of said land as owner thereof or otherwise at each of the said periods above enquired about? Have you or either of you ever seen any change in the person or persons who have been in possession of said land since either of the periods above enquired about; if yea, when did such change occur, or about what time?

Direct Int'y 7 to each of the witnesses. Who was in possession of said land as the ostensible owner thereof at each of the periods above inquired about? Who is now in possession of said land as the ostensible owner thereof, and when or about when 48 did such possession commence? Is or not said plantation now known by the name of the Warren plantation; and, if yea, when or about when was it first called or known as the Warren plantation, and prior to that time by what name had it been known or called?

Direct Int'y 8 to each of the witnesses. Do you or either of you know anything about the kind, character, and amount of crops grown on said plantation during the years 1866 and 1867, respectively, or either of said years. If yea, state the facts fully and particularly.

W. L. BRAGG & J. M. VAN HOOSE,
Solicitors for Plaintiffs.

To John S. Kennedy and Mary E. Kennedy, his wife, and Edward Warren and Vernon K. Warren, his wife, defendants in the
49 above cause, or Watts & Sons, their solicitors of record:

Take notice that we have filed the above interrogatories in said cause to the above-named witnesses, Cornelius D. Walker, Calvin U. Silliman, and Robert Greenlee; that each of said witnesses reside in Sumter county, in the State of Alabama; that we suggest George U. Walker, Esq., who resides at the town of Gainesville, in the county and State last aforesaid, as a fit and suitable person to act as commissioner in taking the depositions of said witnesses on said interrogatories and such interrogatories as you may propound to said witnesses; and that at the expiration of the period fixed by law and the rules of said court in such cases we will apply to the clerk of said court for a commission to issue to said George U. Walker, Esq., as commissioner, to take the depositions of said wit-
50 nesses on the foregoing and such interrogatories as you may propound to them.

W. L. BRAGG & J. M. VAN HOOSE,
Sol'rs for Plaintiffs.

Filed 5th March, 1880.

J. W. DIMMICK, *Clerk.*

We hereby waive legal notice and consent to cross or object to the within interrogatories within five days.

March 5, 1880.

H. M. SOMERVILLE,
WATTS & SONS,
A. B. McEACHIN,
Att'ys for Defendants.

Let com'n issue now.
March 6, 1880.

WATTS AND SONS,
For Def'ts.

Commission to Take Deposition.

UNITED STATES OF AMERICA:

District Court of the United States for the Middle District of Alabama.

To George U. Walker, Esq., Gainesville, Sumter Co, Alabama:

51 Know ye that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Cornelius D. Walker, Calvin U. Silliman, and Robert Greenlee, as witnesses in behalf of plaintiffs in a case pending in the district court of the United States for the middle district of Alabama, at Montgomery, sitting as a court of bankruptcy, wherein Frank S. Moody & Rich'd C. McLester, as assignees in bankruptcy of Baugh, Kennedy & Co., bankrupts, are plaintiffs, and John S. Kennedy & Mary E. Kennedy, his wife, and Edward Warren and Vernon K. Warren, his wife, are defendants, on oath, to be by you administered, upon interrogatories annexed to this commission, to take and certify the depositions of the witnesses and return the same to our said district court, with all convenient speed, under your hand and seal. 52

Witness the Hon. John Bruce, judge of the district court of the United States for the middle district of Alabama, this 9th day of March, A. D. one thousand eight hundred and eighty.

[L. S.] J. W. DIMMICK,
Clerk U. S. Dist. Court, Mid. Dist. of Alabama.

Directions.

1. If the time and place of executing the commission are not named therein the commissioner will subpœna the witnesses to appear before them at such time and place as they may appoint, and administer the oath to witnesses.

2. Either the commissioner, witness, or some impartial person must reduce the answers of witnesses to writing, as near as may be, in the language of the witness.

53 3. The heading or title of the deposition should be in this form: "Deposition of A B, witness, sworn (or affirmed) and examined under and by virtue of a commission issued out of the dist. court of the United States for the middle district of Alabama, in a certain cause therein pending between C D, plaintiff, and E F, defendant A B. of ——, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows: 1st. To the 1st Int'y he saith: ——. 2nd. To the 2nd Int'y he saith: ——. 1st. To the first cross-int'y he saith: ——." When the deposition is finished it must be subscribed by the witness.

(Witness' name): A B.

And certified as follows: "We, the commissioners (if all act, or I, if one of the commissioners, as the case may be), in said commission named, do hereby certify that the evidence of the witness, A B, was

taken down under oath and subscribed by him in our pres-
54 ence on the — day of —— 18—, at ——, in the county of ——, State of ——, and that we have personal knowledge of said witness, or (if unacquainted with the witness) that proof has been made before us of the personal identity of said witness, and that we are (or I am) not of counsel in the cause, or of kin to any of the parties in interest, or in any manner interested in the result thereof. Witness my hand & seal.

"G H. [SEAL.]"

4. The commissioners will fold the commission, interrogatories, answers, and any document deposed to by the witness in a packet sealed. They will write their names across the seals, and direct thus:

C D
vs.
E F.
Deposition of
A B,
Witness for the plaintiff
(or defendant).

To J. W. Dimmick, Esq., clerk of the dist. court U. S. for the mid. dist. of Ala., Montgomery, Alabama.

The package may be sent by mail or private conveyance.
55 If sent by mail, on back, take receipt of P. M. thus: "Received this package of G H, commissioner, to be forwarded by due course of mail.

"E G, *Postmaster*."

Deposition of Robert Greenlee, a witness sworn and examined under and by virtue of a commission issued out of the district court of the United States for the middle district of Alabama, in a certain cause therein depending between Frank S. Moody and Richard C. McLester, as assignees in bankruptcy of Baugh Kennedy & Co., plaintiffs, and John S. Kennedy and Mary E. Kennedy, his wife, and Edward Warren and Vernon K. Warren, his wife, defendants.

ROBERT GREENLEE, of Sumter county, Alabama, being sworn at the law office of Jolly & Walker, in Gainesville, said county & State, on the 11th day of March, 1880, to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1st. To the first interrogatory he saith: I reside in Sumter
56 county, in the State of Alabama. I have resided in said county and State all my life. I am forty years of age. I am engaged in the occupation of farming, in which I have been occupied for twelve years past.

2nd. To the second interrogatory he saith: I know the place inquired about in interrogatory number 2 and called the Warren plantation, near Gainesville, in Sumter county, Alabama, and more particularly described by numbers in said interrogatory. I have known said land for twelve years.

3rd. To the third interrogatory he saith: I do not know about what the cash market value of said tract of land was on or about the 31st day of December, 1866.

4th. To fourth interrogatory he saith: I do not know about what the cash market value of said tract of land was on or about the seventh day of October, 1867. I did not know the land till the
year 1868.

57 5th. To fifth interrogatory he saith: I do not know about
what amount of said land, if any, was cleared and in a state *of* condition for cultivation at the periods above inquired about in the interrogatory number 5, as I did not then know the place at all. In January of the year 1868, when I first saw the Warren place, there was on it a good double log cabin, suitable for white persons to occupy, and there were also plenty of cabins in good condition to accommodate a sufficient number of hands to cultivate the plantation, and the place was fenced in with good fences, in good condition. I can only say that these improvements showed, from their appearance, that they had been there before long enough to embrace the 7th of October, 1867, and the 31st day of December, 1866, and all of them were in a good condition. As to the quality and charac-
ter of the soil of said lands, they are of that kind which I
58 designate as good lands, plenty of it adapted to corn and
other —; of good river bottom for cotton, to make it almost an equally divided tract as to these two agricultural productions; and I judge, of course, this was so in 1866 and 1867, the two periods inquired about, as it was the case in 1868, the first year I knew the place. The public road from Gainesville to Trussell's Ferry ran directly through this plantation in the years 1866 and 1867 as in 1868. There was a river landing on said place and is yet, the Tombigbee river running alongside of the said lands. At the periods mentioned the railroad from Gainesville, Alabama, to Gainesville Junction, on the Mobile and Ohio railroad, in the State of Mississippi, was in operation, Gainesville being about three miles from said plantation, the nearest market to the same. There is between one
thousand and eleven hundred acres, I believe, on the place,
59 and at the time inquired about there was very little land in it
not fertile. I say so because this was the case in 1868, and has been since.

6th. To sixth interrogatory he saith: I don't know who was in possession of the said land, as owner thereof or otherwise, at each of the said periods inquired about. I have never seen any change such as is asked about in interrogatory number 6.

7th. To seventh interrogatory he saith: I do not know who was in possession of said lands as the ostensible owner thereof at each of the periods inquired about. Edward Warren, Esq., is now in possession as the ostensible owner thereof. He has been renting it out for several years, but I do not know when his possession commenced. It is now known as the "Warren place," and has been ever since I have known it. When it was first called by said name I don't
know; nor do I know by what name it was called or known
60 prior to the time it began to be called the "Warren place."

8th. To eighth interrogatory he saith: I don't know anything about the kind, character, and amount of crops grown on said plantation during the years 1866 and 1867. I did not, as before remarked, know the place till the year 1868.

ROB'T GREENLEE.

I, the undersigned, commissioner in said commission named, do hereby certify that the evidence of the witness, Robert Greenlee, was taken down under oath and subscribed by him in my presence on the 11th day of March, 1880, at the law office of Jolly and Walker, in Gainesville, in the county of Sumter, State of Alabama, and that I have personal knowledge of the said witness, and that I am not of counsel in the cause, or of kin to any of the parties in interest, or in any manner interested in the result thereof.

Witness my hand and seal.

GEORGE U. WALKER, [SEAL.]
Commissioner.

61 Deposition of Cornelius D. Walker, a witness sworn and examined under and by virtue of a commission issued out of the district court of the United States for the middle district of Alabama, in a certain cause therein depending between Frank S. Moody and Richard C. McLester, as assignees in bankruptcy of Baugh, Kennedy & Co., plaintiffs, and John S. Kennedy and Mary E. Kennedy, his wife, and Edward Warren and Vernon K. Warren, his wife, defendants.

CORNELIUS D. WALKER, of Sumter county, Alabama, being sworn at the law office of Jolly & Walker, in Gainesville, said county and State, on the 12th day of March, 1880, to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1st. To first interrogatory he saith: I reside in Sumter county, in the State of Alabama. I have resided in the said county and State for over thirty years. I am forty-six years of age; will be, in 62 June, 1880, forty-seven years of age. I am engaged in farming and merchandising, and have been so occupied for the last twelve years.

2d. To second interrogatory he saith: I know the "Warren plantation" inquired about in interrogatory number 2, and have known it about thirty years.

3d. To third interrogatory he saith: I know the cash market value of the said "Warren plantation," and know what it was, I think, on or about Dec. 31, 1866. I should say it was then worth, cash market value, six dollars per acre. I predicate this opinion upon the knowledge I had of the place and its situation, and what I knew such lands sold for at that time.

4th. To fourth interrogatory he saith: I know about what the cash market value of said "Warren plantation" was on or about the 7th day of October, 1867, and knowing the plantation, being familiar with its location, surroundings, and condition, say it was 63 worth then six dollars cash per acre.

5th. To fifth interrogatory he saith: I can only say in answer to interrogatory number 5, that in December, 1866, and Octo-

ber, 1867, there was about the same amount of land on the "Warren place" in a cleared and suitable condition for cultivation that there is now, but while I know that there was and is a good deal of — so, I can't give the number of acres. There was at the dates mentioned a good, double log cabin, suitable for a family of white persons, and a number of other good log cabins and good fences on the place, besides a gin-house and a screw in good condition. The quality and character of the soil of said lands was and is good, about equally divided, I should say, into good corn and cotton land; said land was well adapted to corn and cotton, besides being a good stock farm;
said land was intersected then by the public road from Gaines-
64 ville to Trussel's Ferry, is about three miles from Gainesville
to terminus of the branch road from Gainesville to Gainesville Junction, which railroad was in operation in 1866 and 1867, and the Tombigbee river ran alongside of the place, on the bank of which was a landing place for shipping purposes, and so was in easy reach of good markets. At the periods Dec. 31, 1866, and October 7th, 1867, about which I am testifying, there was in all of the whole place not cultivated, because it was not fertile, I should guess, somewhere about fifty acres; the balance was and is generally fertile.

6th. To sixth interrogatory he saith: I can't remember which of the two, but think that either Mr. Kennedy or Mr. Warren was in possession of the said land at the dates inquired about. I never observed any change in the person or persons such as is asked
about.

65 7th. To seventh interrogatory he saith: I can't remember
who was, whether Warren or Kennedy, at the periods enquired about, in possession as the ostensible owner thereof. Edward Warren is, I think, now in possession of the place as owner, but it is rented to Mr. Mayer and Mr. M. L. Wells. I don't remember when Mr. Warren's possession began. The said plantation is now known as the Warren plantation. I don't remember exactly when it commenced to be called so. Before it was known as the "Warren place" it was called the "Minniece place."

8th. To eighth interrogatory he saith: I can't give numbers of bushels of corn, &c., nor bales of cotton, but know that in the years 1866 and 1867 good crops of both were made on the said place.

CORNELIUS D. WALKER.

I, the undersigned, commissioner in said commission named, do hereby certify that the evidence of the witness Cornelius D. Walker
was taken down under oath and subscribed by him in my
66 presence on the 12th day of March, 1880, at the law office of
Jolly & Walker, at Gainesville, in the county of Sumter and State of Alabama, and that I have personal knowledge of said witness, and that I am not of counsel in the cause or of kin to any of the parties in interest, or in any manner interested in the result thereof

Witness my hand and seal.

GEORGE U. WALKER, [SEAL.]
Commissioner.

Deposition of Calvin U. Silliman, a witness sworn and examined under and by virtue of a commission issued out of the district court of the United States for the middle district of Alabama, in a certain cause therein depending between Frank S. Moody & Richard C. McLester as assignees in bankruptcy of Baugh, Kennedy & Co., plaintiffs, and John S. Kennedy & Mary E. Kennedy, his wife, and Edward Warren and Vernon K. Warren,
67 his wife, defendants.

CALVIN U. SILLIMAN, of Sumter county, Alabama, being sworn, at the law office of Jolly & Walker, in Gainesville, in said county, on the 17th day of March, 1880, to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

To first interrogatory he saith: I reside in Sumter county, Alabama. I have resided in said county and State about fifteen years. I am forty-seven years old April 7th, 1880. I am a practising physician, and have been engaged in that business since the year 1855—about twenty-five years.

To second interrogatory he saith: I have known the plantation called the "Warren Place," near Gainesville, in Sumter county, Alabama, about eight years.

To third interrogatory he saith: The cash market value of
68 the tract of land mentioned in my answer above on or about
December 31st, 1866, was, I would say, from eight to ten dollars per acre. I predicate my opinion on the location of said land, its fertility, and what such land was selling for at that time.

To fourth interrogatory he saith: For answer to this fourth interrogatory I refer to my answer to the third interrogatory.

To fifth interrogatory he saith: At the periods inquired about, Dec. 31, 1866, and October 7, 1867, there was about three hundred acres cleared land in a state of condition for cultivation. The improvements on said lands at those periods were medium—gin-house and screw, and pretty good outhouses; fences tolerable. There is some prairie, some post oaks, and some sandy lands on the place. These lands were adapted then to the production of corn and cotton. As to convenience of public roads, &c., it was well
69 situated; public road ran through it from Gainesville to Trussell's Ferry; river ran alongside of it, and the Gainesville branch railroad in operation within three miles of it. I don't know the proportions exactly of fertile and sterile land on the place, but would say about one-third not fertile.

To sixth interrogatory he saith: I don't know who was in possession of said lands as owner or otherwise at the periods enquired about. I have seen no such change in the person or persons in possession of said lands as that asked about.

To seventh interrogatory he saith: For answer as to who was in possession as ostensible owner at the periods enquired about, I refer to my answer to sixth interrogatory. Mr. Warren is now in possession as the ostensible owner of said place, but I don't know when his possession commenced. It is now known as the "Warren plan-

tation;" don't know when it was first called so; don't know
70 what it was called before that time.

To eighth interrogatory he saith: I don't know anything about the crops raised on said place in the years 1866 and 1867.

C. U. SILLIMAN.

I, the undersigned commissioner in said commission named, do hereby certify that the evidence of the witness, Calvin U. Silliman, was taken down under oath and subscribed by him in my presence on the 17th day of March, 1880, at the law office of Jolly & Walker, in Gainesville, in the county of Sumter, State of Alabama, and that I have personal knowledge of said witness, and that I am not of counsel in the cause or of kin to any of the parties in interest, or in any manner interested in the result thereof.

Witness my hand and seal.

GEORGE U. WALKER, [SEAL.]
Commissioner.

71 Received and filed this 22d day of March, A. D. 1880.

J. W. DIMMICK, *Clerk.*

Published by consent of the parties without prejudice, this March 29, 1880.

J. W. DIMMICK, *Clerk.*

Agreement of Counsel to Publish Depositions Without Prejudice.

U. S. Dist. Court, Middle District of Alabama, sitting as a Court of Bankruptcy. In Equity.

MOODY & MCLESTER, Assignees, &c.,

vs.

JOHN S. KENNEDY *et als.*

We agree that the clerk may open and publish the depositions in the above cause without prejudice.

This March 27, 1880.

W. L. BRAGG & J. M. VAN HOOSE,
Sol'rs for Plaintiffs.
WATTS & SONS & SOMERVILLE,
For Defendants.

Filed March 29, 1880.

J. W. DIMMICK, *Clerk.*

72 *Agreement of Counsel. June 4th*, 1880.

In U. S. District Court. May Term, 1880.

Moody & McLester, Assignees,
vs.
Edward Warren and Wife *et als.*

It is admitted that the facts set forth in the answers are substantially true, except so far as controverted by the depositions and other evidence in the cause.

W. L. BRAGG & J. M. VAN HOOSE,
Sol'rs for Plaintiffs.

Note of Testimony.

Frank S. Moody & Rich'd C. McLester, Assignees, &c.,
vs.
John S. Kennedy *et als.*

This cause came on to be heard on this day, and the same was submitted by the parties for decree upon the pleadings and 73 the following note of testimony:

The compl'ts offer & introduce in evidence—
1st. Deposition of Robert Greenlee.
2. Deposition of Cornelius D. Walker.
3. Deposition of Calvin U. Silliman.
4. Exhibit to bill; deed of Kennedy & wife to Mrs. Warren.

The defendants offer in evidence and introduce the same—
1. The agreement of counsel, dated May term, 1880, filed 4th June, 1880.
2, Answers of def'ts under said agreement.
3. Exhibits to answers.

J. M. VAN HOOSE and W. L. BRAGG,
Solicitors for Plaintiffs.
H. M. SOMERVILLE & WATTS and SONS,
Solicitors for Defendants.

Filed 4th June, 1880.

J. W. DIMMICK, *Clerk.*

74 *Decree of Sale.*

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy. Equity Docket. May Term, 1880.

Rich'd C. McLester & Frank S. Moody, as Assignees, &c., of John S. Kennedy, a Bankrupt,
vs.
Edward Warren, Vernon L. Warren, *et als.*

This cause came on to be heard on this day of the term, and was submitted by the parties for decree, and the same having been argued by counsel and duly considered by the court, it is ordered, adjudged, and decreed by the court that the complainants are entitled to relief, and that the deed made by John S. Kennedy and his wife, Mary E. Kennedy, to the respondent, Vernon L. Warren, bearing date December 31, 1866, and acknowledged October 7th, 1867, and a copy of which is attached to the bill of complaint in this cause, 75 be, and the same is hereby, set aside, vacated, and annulled, and that the property therein described be sold by complainants, as assignees as aforesaid, at public outcry, for cash, at Livingston, in the county of Sumter, Alabama, after first giving three weeks' notice of the time, place, and terms of such sale, by publication in some newspaper published in the said town of Livingston, Sumter county, Alabama, and also in some newspaper published in the town of Tuscaloosa, in Tuscaloosa county, said State, the said property so directed to be sold being described as follows, to wit: The east half of the southeast quarter of fractional section seven, fractional section eight, fractional section seventeen; the east half of the east half of section eighteen; thirty-four acres off the east side of the west half of the southeast quarter of section eighteen, and north half of 76 section twenty, all in township twenty-one, range one west, in the county of Sumter, in the State of Alabama, and containing one thousand and fifty-six acres, more or less.

It is further ordered by the court that said lands be sold in lots or parcels, or as a whole, according to what may be deemed by said assignees best for the interests of all parties concerned, and that the proceeds of such sale, after paying the costs of these proceedings, be held by said assignees, subject to distribution among the creditors of said bankrupt under the orders and directions of this court, according to the respective rights and priorities of such creditors of the said Vernon L. Warren and Edward Warren.

It is further ordered that the said assignees make due report to this court of their acts and doings in the premises within twenty days after such sale.

It is further ordered by the court that this cause be, and the 77 same is hereby, referred to J. W. Dimmick, Esq., as special master, to ascertain and report to this court with all convenient speed, the amounts due the from said John S. Kennedy, upon the several demands set forth in the bill of complaint in this cause, and which up to the time of holding such reference have been duly filed and proven in this court against the estate of said John S. Kennedy, the said bankrupt.

Dated July 9, 1880.

JOHN BRUCE, *Judge.*

Filed July 9, 1880.

J. W. DIMMICK, *Clerk.*

Application for Writ of Error.

In the Case of Moody & McLester, as Assignees, &c., of John S. Kennedy, Bankrupt,

vs.

Edward Warren & Vernon L. Warren *et als.*

78 The defendants pray for a writ of error from decree ren-

dered 9th day of July, 1880, ordering sale of the lands in controversy to the circuit court of the United States for the middle district of Alabama, at Montgomery, Sept. 1, 1880.

SOMERVILLE & WATTS & SONS,
For Defendants.

Filed Sept. 1, 1880.

J. W. DIMMICK, *Clerk.*

Order Allowing Appeal.

District Court of the United States for the Middle District of Alabama.

MOODY & MCLESTER *vs.* ED. WARREN, VERNON WARREN, *et als.*

It is ordered and decreed in the above-named case that defendants have the right of appeal or writ of error on entering into bond, with two good and sufficient securities, in the sum of two hundred and fifty dollars, conditioned to pay all such damages and costs as may be incurred by the wrongful suing out of said appeal.

79 Given this 20th day of September, 1880.

JOHN BRUCE, *Judge.*

Filed Sept. 20, 1880.

J. W. DIMMICK, *Clerk.*

Appeal Bond.

In the District Court of the United States for the Middle District of Arkansas.

MOODY AND MCLESTER, Assignees,
vs.
EDWARD WARREN, VERNON L. WARREN

Know all men by these presents that we, Edward Warren, Vernon L. Warren, John S. Kennedy, Jno. R. Kennedy, and Geo. W. Cox, of the county of Tuscaloosa and State of Alabama, are held and firmly bound in the sum of two hundred and fifty dollars, well and truly to be paid to Jos. W. Dimmick & his successors in office, as clerk of the circuit court of the United States for the middle district of Alabama.

80 Sealed with our seals this — day of —— (1880), eighteen hundred and eighty.

The condition of the above obligation is such that whereas on the 9th day of July, 1880, a final decree was rendered in the district court of the United States for the middle district of Alabama against the defendants in the above-entitled cause therein pending, and the said defendants having obtained a writ of error to the circuit court of the United States for the middle district of Alabama, and having filed a transcript of the record of said district court in said cause in the office of the clerk of the circuit court of the United States for the middle district of Alabama to reverse the judgment in the aforesaid

suit: Now, if the obligors shall well and truly pay, or cause to be paid, to the said Jos. W. Dimmick or his successors in office all such costs and damages as may be incurred by the wrongful suing out of such writ of error this obligation to be null and void; other-
81 wise, to remain in full force and effect.

ED. WARREN. [L. S.]
VERNON L. WARREN. [L. S.]
JNO. S. KENNDY. [L. S.]
JNO. R. KENNEDY. [L. S.]
GEO. W. COX. [L. S.]

STATE OF ALABAMA, *Tuscaloosa County:*

Subscribed before me this Sept. 30th, 1880.

W. C. JEMISON,
Notary Public.

The above bond is hereby approved, Oct. 28, 1880.

JOHN BRUCE, *Judge.*

Filed this 28th day of October, 1880.

J. W. DIMMICK,
Clerk, U. S. Court.

UNITED STATES OF AMERICA, } *ss:*
Middle District of Alabama, }

I, J. W. Dimmick, clerk of the district court of the United States for the middle district of Alabama, hereby certify that the
82 foregoing pages numbered from one to sixty-four, inclusive, contain a true and correct transcript of the record and proceedings in said court in a cause lately pending therein, wherein Frank S. Moody & Richard C. McLester, as assignees, &c., of Baugh, Kennedy & Co., are plaintiffs, and Edward Warren, Vernon L. Warren and others, defendants, as the same appear of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed at Montgomery, in said district, this 29th day of October, in the year of our Lord one thousand eight hundred and eighty.

[L. S.] J. W. DIMMICK,
Clerk, U. S. Dist. Court, Mid. Dist. of Alabama.

[Endorsed:] Filed Nov. 1, 1880. J. W. Dimmick, clerk.

83 *Order Allowing Amendment to Complaint, &c.*

In the Circuit Court of the United States for the Mid. Dist. of Ala.

MOODY and McLESTER, as Assignees, &c.,
vs.
WARREN and Wife *et als.*

On appeal from the district court in bankruptcy this cause came on further to be heard at this term of the court on motion of complainants to amend the bill by adding thereto an additional paragraph, as per amendment filed this day, and on consideration thereof it is ordered that the said motion be, and is hereby, granted and the said amendment allowed, reserving to the defendants the right to object thereto and to move to strike the said amendment from the files or to demur thereto.

And it is further ordered that respondents have thirty days in which to file their answers to said bill as amended.

June 6, 1881.

W. B. WOODS,
Circuit Justice.

84 Filed this 6th day of June, A. D. 1881.

J. W. DIMMICK, *Clerk.*

Amendment to Bill of Compl't.

In the Circuit Court of the U. S. for the Mid. Dist. of Ala. May Term, 1881.

MOODY and MCLESTER, Assignees, &c.,
vs.
WARREN and Wife *et als.*

Come the complainants in this cause, and by leave of the court first had and obtained amend the bill of complaint by adding the following paragraph, to wit:

Third. Complainants aver that the only interest which Mrs. Mary E. Kennedy, the wife of said John S. Kennedy, ever had or owned in said lands was an inchoate right of dower, and that she signed said deed with her said husband, John S. Kennedy, simply for the purpose of relinquishing her said dower interest, and for no other purpose.

85 W. L. BRAGG, J. M. VAN HOOSE,
Compl't's Solicitors.

Filed by leave of the court this 6th day of June, A. D. 1881.

J. W. DIMMICK, *Clerk.*

Motion to Strike Amendment from the Files.

Circuit Court of the United States for the Middle District of Alabama.

FRANK S. MOODY and RICH'D C. MCLESTER, Assignees, &c., Baugh, Kennedy & Co.,
vs.
EDWARD WARREN & VERNON L. WARREN *et als.*

The said Edward L. Warren and Vernon L. Warren come and move the court to strike from the file the amendment to the bill of complaint filed June 6, 1881, on the grounds and for the reasons following:

1. That the amendment was irregularly allowed.

2. That the circuit court had no power or jurisdiction to
86 allow an amendment of the bill when and where the case is pending in said court on a regular appeal from the district.

3. That the jurisdiction of the circuit in a case of appeal in equity from the district court is appellate and not original, and no amendment of the pleading can be made or allowed pending the appeal.

CLOPTON, HERBERT & CHAMBERS,
Sol'rs for Defendants.

Filed the 30th Nov., 1881.

J. W. DIMMICK, *Clerk.*

87 *Appeal from District Court of the U. S. for Mid. Dist. of Alabama, in Bankruptcy.*

In the Circuit Court of the United States for the Middle District of Alabama, in the 5th Circuit.

EDWARD WARREN and WIFE, Appellants,
vs.
F. S. MOODY, as Assignee, &c., Appellee.

On motion of appellants to strike amendment to bill from the file, before me, Joseph W. Dimmick, clerk of said circuit court, this day personally came Wm. S. Thorington, who, being duly sworn, states on oath that he is one of the solicitors for the appellee in said cause, and was present at the trial of said cause in said district court of the United States for the middle district of Alabama; and that the said appellants, Warren & wife, were represented in said court in said cause by Thomas H. Watts, Esq., and that on the trial in said district court it was not claimed that Mrs. Mary E. Ken-
88 nedy, wife of said John S. Kennedy, had or owned any interest in the lands in controversy, and no demurrer or other objection was made to the bill on the ground that she was joint owner of said property with her husband, John S. Kennedy; nor was the question raised or argued or referred to in any manner as to such joint ownership of said land; and, on the contrary, the said cause was tried in the said district court in every particular as if said bill had simply averred the ownership of said property to be in John S. Kennedy alone, and that the point as to their joint ownership of said property was made for the first time in this court by David Clopton, Esq., representing said appellants in this court on the hearing of said cause before Honorable Wm. B. Woods, then sitting as circuit judge.

WM. S. THORINGTON.

89 Sworn to and subscribed before me this 1st day of December, 1881.

J. W. DIMMICK,
Clerk U. S. Cir. Court.

Filed by leave of the court this 1st day of December, 1881.
J. W. DIMMICK, *Clerk.*

Order Overruling Motion to Strike Amendment from the Files. Decree Pro Confesso upon Amended Bill, &c.

In the Circuit Court of the United States for the Fifth Judicial Circuit and Middle District of Alabama. Fall Term, A. D. 1881.

EDWARD WARREN and VERNON L. WARREN, his wife, *et als.*, Appellants,

vs.

FRANK S. MOODY and RICHARD C. MCLESTER, as Assignees, &c., of Baugh, Kennedy & Co., Bankrupts, Appellees.

This cause came on to be heard at this term on the motion of the said appellants to strike from the files a certain amendment 90 to the bill of complaint in this cause, which amendment was filed in this court on the sixth day of June, in the year one thousand eight hundred and eighty-one, and which amendment was on, to wit, the day and year last aforesaid, allowed by this court, with leave to appellants to move to strike the same from the files or demur thereto.

And the said motion having been argued by counsel of the parties, and considered and understood by the court, it is now ordered, adjudged, and decreed by the court that the said motion be, and the same is hereby, overruled and denied at the cost of the appellants, to be taxed by the clerk of this court.

And it is further ordered, adjudged, and decreed by the court that the said amendment be, and the same is hereby, allowed upon terms, which terms are that the appellants and the sureties upon 91 their appeal bond pay all the costs of this cause incurred in this court, to be taxed by the clerk of this court, for which let execution issue, and that the appellees, as such assignees aforesaid, pay all the costs of this cause incurred in the district court, from which last court this cause was appealed, to be taxed by the clerk of this court, for which let execution issue.

And thereupon the said appellees move the court for a decree *pro confesso* upon said bill as amended by said amendment; and it appearing to the court that said bill, as amended as aforesaid, has been duly served upon the said appellants and that the said appellants have failed and refused to plead, answer, or demur to said amended bill within the time prescribed by law and the rules of this court, it is therefore ordered, adjudged, and decreed by the 92 court that said bill as amended do stand confessed by the said appellants as to all matters and things, as alleged in said amended bill.

Decree rendered Dec. 1st, 1881, and signed same day.

DON A. PARDEE,
Circuit Judge.

Filed this 1st day of December, A. D. 1881.

J. W. DIMMICK, *Clerk.*

93 *Final Decree.*

In the Circuit Court of the United States for the Fifth Judicial Circuit and Middle District of Alabama. Fall Term, A. D. 1881.

EDWARD WARREN and VERNON L. WARREN, his Wife, *et als.*, Appellants,

vs.

FRANK S. MOODY & RICHARD C. McLESTER, as Assignees in Bankruptcy of Baugh, Kennedy & Co., Bankrupts, Appellees.

This cause came on to be further heard at this term, the parties being present, by their solicitors, and submitted the same for final decree; thereupon it was submitted for such final decree; upon consideration whereof, it is ordered, adjudged, and decreed by the court that the said appellees are entitled to the relief they seek, and that the decree of the said district court appealed from in this cause be, and the same is hereby, in all things affirmed.

94 And appellants having, in open court, applied to the court to fix the amount of a supersedeas bond for an appeal in this cause to the Supreme Court of the United States, said bond is fixed by the court at three thousand dollars; and it is ordered by the court that the sureties on said bond justify, under oath, before Joseph W. Dimmick, Esq., clerk of this court, and that said clerk certify to the sufficiency of said sureties to the judge of this court.

Decree rendered Dec. 1st, 1881, and signed same day.

DON A. PARDEE,
Circuit Judge.

Filed this 1st day of December, A. D. 1881.

J. W. DIMMICK, *Clerk.*

95 *Petition for Appeal & Order Allowing Same.*

In the Circuit Court of the United States for the Fifth Judicial Circuit and Middle District of Alabama. Fall Term, A. D. 1881.

EDWARD WARREN and VERNON WARREN, his Wife, *et als.*, Appelants,

vs.

FRANK S. MOODY and RICHARD C. McLESTER, as Assignees in Bankruptcy of Baugh, Kennedy & Co., Bankrupts, Appellees.

The appellants pray for an appeal from decree rendered in the above-named case on the 1st day of December, A. D. 1881, to the Supreme Court of the United States at Washington, District of Columbia.

JOHN T. MORGAN,
For Appellants.

96 An appeal, not to operate as a supersedeas, is allowed as prayed for in the foregoing petition for appeal on the appel-

lants giving bond in the penalty of three hundred dollars, conditioned, and with sureties to be approved according to law.

October 30, 1883.

W. B. WOODS,
Associate Justice U. S. Supreme Court and Circuit Justice Fifth Circuit.

Filed Nov. 22d, 1883.

J. W. DIMMICK, *Clerk.*

97 *Appeal Bond.*

Know all men by these presents that we, Edward Warren and Vernon K. Warren, his wife, of the city of Birmingham, and John S. Kennedy, Julian C. Perkins, of Tuscaloosa, and T. L. Hudgins and J. W. Sloss, of the city of Birmingham, all of the State of Alabama, are held and firmly bound unto Frank S. Moody & Richard C. McLester, assignees in bankruptcy of Baugh, Kennedy & Co., and also of Jno. S. Kennedy, in the full and just sum of three hundred dollars, current money of the United States, to be paid to the said Frank S. Moody & Richard C. McLester, assignees, &c., their heirs, executors, & administrators,—jointly and severally, by these presents. Sealed with our seals and dated this 14th day of November, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at the fall term of the circuit court of the United States for the fifth judicial circuit, sitting at Montgomery, 98 Alabama, in a suit depending in said court between Edward Warren, Vernon K. Warren, his wife; Jno. S. Kennedy & Mary E. Kennedy, his wife, appellants, and Frank S. Moody and Richard C. McLester, assignees in bankruptcy, as aforesaid, appellants, a final decree was rendered against the said Edward Warren and Vernon K. Warren, and the said Edward Warren & Vernon K. Warren having prayed for and obtained an appeal to remove the said cause to the Supreme Court of the United States for review, not to operate as a supersedeas: Now, the condition of the above obligation is such that if said appellants shall prosecute their said appeal to effect, and if they fail to make their plea good, then they shall well and truly pay, or cause to be paid, to the said appellees all costs that may accrue in said appeal, and that may be charged to the said Edward Warren & Vernon K. Warren, then the above obligation to be void; otherwise to remain in full force and virtue.

99 ED. WARREN. [SEAL.]
VERNON K. WARREN. [SEAL.]
JNO. R. KENNEDY. [SEAL.]
JULIAN C. PERKINS. [SEAL.]
J. W. SLOSS. [SEAL.]
T. L. HUDGINS. [SEAL.]

Signed, sealed, & delivered in presence of—
JNO. S. KENNEDY.

Approved Nov. 19, 1883.

W. B. WOODS,
Associate Justice U. S. Supreme Court.

Personally appeared before me Jno. S. Kennedy, who is known to me, and made oath in due form of law that the foregoing parties signed the above bond in his presence, viz., Edward Warren, Vernon K. Warren, Jno. R. Kennedy, Julian C. Perkins, J. W. Sloss, & T. L. Hudgins; that their signatures are genuine.

JNO. S. KENNEDY.

Sworn to and subscribed before me this 15th Nov'r, 1883.

J. W. DIMMICK,
U. S. Cir. C't Com'r, Mid. Dist. Ala.

100 THE STATE OF ALABAMA, *City of Montgomery:*

Office of the clerk of the United States Circuit Court for the 5th Circuit, at Montgomery, Ala.

Personally came before me Josiah Morris, banker, who is well known to me, and made oath in due form of law that he is well acquainted with the handwriting of T. L. Hudgins and J. W. Sloss, both of Birmingham, Ala., and that the signatures of the names of each to the foregoing bond for $300, payable to Frank S. Moody & R. C. McLester, assignees, &c., are genuine & in the handwriting of each.

He further deposes that he is well acquainted with the financial standing of said Hudgins & Sloss, and that they are each worth over one hundred thousand dollars, in his opinion.

101 He also deposes that the names of said Hudgins & Sloss, as they appear on another bond for $300 for costs, payable to Jas. H. McKenney, clerk of the Supreme Court of the United States, are genuine signatures & in the handwrite of said Hudgins & Sloss.

JOSIAH MORRIS.

Sworn to and subscribed before me this 15th day of Nov., 1883.

J. W. DIMMICK,
U. S. Cir. Court Com'r, Mid. D. of Ala.

Filed Nov. 22d, 1883.

J. W. DIMMICK, *Clerk.*

102 *Citation.*

The United States of America to Frank S. Moody and Richard C. McLester, assignees in bankruptcy of Baugh, Kennedy and Company and Jno. S. Kennedy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an order allowing appeal filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein Edward Warner and Vernon K. Warner, his wife, and John N. Kennedy and Mary E. Kennedy, his wife, are appellants and you are appellees, to show cause,, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

103 Witness the Honorable William B. Woods, associate justice of the Supreme Court of the United States, this 19th day of November, in the year of our Lord one thousand eight hundred and eighty-three.

WILLIAM B. WOODS.

Rec'd in office Nov'r 22d, '83. Executed by serving copy on W. L. Bragg, at Montgomery, Ala., Nov. 22, '83.

PAUL STROBACH,
U. S. Marshal.

Marshal's costs, $2.00.

On this 22nd day of November, in the year of our Lord one thousand eight hundred and eighty-three, personally appeared before me the subscriber, Paul Strobach, and makes oath that he delivered a true copy of the within citation to W. L. Bragg, solicitor of record of Moody & McLester, assignees in bankruptcy of Baugh, Kennedy & Co.

PAUL STROBACH, *Marshal.*

Sworn to and subscribed the 22nd of November, A. D. 1883.

J. W. DIMMICK,
United States Circuit Court Commissioner
in & for said Middle Dist. of Ala.

104 UNITED STATES OF AMERICA,
Middle District of Alabama, } *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit, hereby certify that the foregoing pages, numbered from one to one hundred and three, inclusive, contain a full, true, and complete transcript of the record and proceedings in a cause lately pending in said court, wherein Edward Warren, Vernon Warren, and others were plaintiffs in error and Frank S. Moody & Richard C. McLester, as assignees, &c., were defendants, as the same appear of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed at Montgomery, in said district, this 23rd day of November, A. D. 1883.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

Endorsed on cover: M. Alabama C. C. U. S. No. 479. Edward Warren and Vernon K. Warren, his wife, and John S. Kennedy and Mary E. Kennedy, his wife, appellants, *vs.* Frank S. Moody & Richard C. McLester, assignees in bankruptcy of Baugh, Kennedy & Company and John S. Kennedy. Filed 26th November, 1883.

Supreme Court of the United States.

OCTOBER TERM 1886.

EDWARD WARREN and VERNON K. WARREN, his Wife, and JOHN S. KENNEDY and MARY E KENNEDY, his Wife, Appellants,
vs.
FRANK S. MOODY and RICHARD C. McLESTER, Assignees in Bankruptcy of BAUGH, KENNEDY & Co. and JOHN S. KENNEDY.
No 216.

And now comes the appellees, by their attorney Michael L. Woods, and move the court to dismiss the appeal herein for want of jurisdiction in this court, the amount involved—the amount of the purchase-money for which the lands in controversy sold under the decree of the court herein, fifteen hundred dollars—not being sufficient to give this court jurisdiction to hear the appeal.

MICHAEL L. WOODS,
Attorney for Appellees.

In the District Court of the United States for the Middle District of Alabama.

RICHARD C. McLESTER and FRANK S. MOODY, Assignees, &c., of JOHN S. KENNEDY, a Bankrupt, *vs.* EDWARD WARREN, VERNON L. WARREN, *et als.*	In Bankruptcy. Equity Docket.

Petition of Assignee for Confirmation of Sale of Land, &c.

Frank S. Moody, the sole surviving assignee in the above-described cause, respectfully reports to the honorable court the following:

That in pursuance of a decree of said court, rendered at the May term, 1880, thereof, at the court-house, in the town of Livingston, in the county of Sumter, in the State of Alabama, after giving three weeks' notice of the time and place and terms of sale, by publication in the Livingston *Journal*, a newspaper published in the town of Livingston, in the county of Sumter, and also in the Tuscaloosa *Gazette*, a newspaper published in the city and county of Tuscaloosa, both in the State of Alabama, he proceeded to sell the following-described lands within the legal hours of sale, to wit:

The east half of the southeast quarter of fractional section seven, fractional section eight, fractional seceton seventeen, the east half of the east half of section eighteen, thirty-four acres off the east side of the west half of the southeast quarter of section eighteen and north half of section twenty, all in township twenty of range one west, containing one thousand and fifty acres, more or less.

When the lands above described were offered for sale, and before any bid was made for the same, John S. Kennedy, one of the defendants in this cause, read a paper to the bystanders in which he informed them that Vernon Warren was prosecuting an appeal in this cause to the Supreme Court of the United States. The said Kennedy stated, in substance, that the purchaser at this sale would not get a clear title to the land, and that such purchaser would be buying at his peril; he endeavored to impress this idea on the bystanders, while the assignee endeavored to counteract such impression.

The first bid was five hundred dollars; there being no further bid from the bystanders, the assignee then bid fifteen hundred dollars.

After the auctioneer had tried in vain to get another bid, the land was knocked off at that sum to Bernhard Friedman, a citizen of Tuscaloosa.

The assignee further reports that said Bernhard Friedman has in writing transferred his bid to A. B. McEachin and W. G. Cochrane, who are willing to pay the purchase money on the confirmation of said sale. A copy of said transfer is hereto attached, marked "Exhibit A," and made a part of this report.

The assignee further reports that being advised by his counsel that he should express to the court an opinion as to whether it would be best that said sale should be confirmed or set aside, he simply states to the court that the price seems small for so large a body of land of the quality of this. But in view of the fact that the land lies about eight miles from any railroad station; that in the section where it is situated both labor and capital are limited; that land generally in that part of Sumter county is greatly depreciated in market value, and that the sale was ordered by the court to be for cash; that not a bid was made for the land when it was offered for sale at public auction nearly a year ago; that at this sale the only bid that was made except the bid at which it was knocked off to said Friedman was five hundred dollars; and the further fact that each time the land was offered for sale Edward Warren or Vernon Warren or John S. Kennedy, or all of them, defendants in this cause, have openly attempted to prevent a sale by announcing, in substance, that the purchaser would be buying a law suit or would not get a good title,—in view of these facts the undersigned assignee does not think it probable that the lands would at any time within the next six months sell for more than it brought at the sale herein reported, that is fifteen hundred dollars. He therefore recommends that the court confirm the sale.

All of which is respectfully submitted.

FRANK S. MOODY,
Sole Surviving Assignee.

STATE OF ALABAMA,
Tuskaloosa County.

Before William C. Jemison, a notary public in and for said State and county, Frank S. Moody, to me personally known, appears and affirms that the statements contained in the foregoing report are true.

FRANK S. MOODY,
Assignee.

Sworn to and subscribed before me this January 30th, 1883.

W. C. JEMISON, *N. P.*

EXHIBIT A.

THE STATE OF ALABAMA,
Tuskaloosa County.

In the District Court of the United State for the Middle District of Alabama.

IN RE R. C. MCLESTER and FRANK S. MOODY, Assignee,
vs.
EDWARD WARREN, VERNON L. WARREN, *et als.*

Whereas at a sale of certain lands sold by Frank S. Moody, sole surviving assignee of John S. Kennedy, a bankrupt, the lands mentioned in the report of sale made by said Moody—of which report this instrument is made a part—were bid off by the undersigned Bernhard Friedman through the said Moody. Therefore, for value received, I hereby transfer to A. B. McEachin and W. G. Cochrane the bid for said lands, the same being the sum of fifteen hundred dollars; and I authorize the court to order titles to be made to them on the confirmation of said sale.

B. FRIEDMAN.

Witness—
S. ODENHEIMER.
LOUIS COHN.

Filed the 5th day of February, 1883.

J. W. DIMMICK, *Clerk.*

In the District Court of the United States for the Middle District of Alabama, sitting as court of bankruptcy.—In Equity.

Frank S. Moody, as Assignee, &c., of Baugh, Kennedy & Co., as partners and individuals, bankrupts, *vs.* Edward S. Warren, Vernon Warren, *et al.*	November Term, 1882.

Decree Confirming Sale of Land.

This day came Frank S. Moody, as assignee in bankruptcy of Baugh, Kennedy & Company, as partners and individuals, bankrupts, and filed and presented to the court his report of sale of the lands which, as such assignee, he was heretofore directed by the decree and order of this court to sell in the above-named cause; and thereupon the court examined and considered said report, and it appearing to the court that said sale was made by said assignee strictly in accordance with the terms and directions of said decree and order of sale; and it further appearing to the court that said sale was so made by said assignee in good faith and to promote the best interest of said estate and to make said property bring the utmost that it would bring at said sale, and that said property did bring the highest and best price that it could be made to bring at said sale, namely, the sum of fifteen hundred dollars, bid by one Bernhard Friedman, said Bernhard Friedman being the highest bidder at said sale, and it further adpearing to the court that the land so sold at said sale was—

The east half of the southeast quarter of fractional section seven, fractional section eight, fractional section seventeen, the east half of the east half of section eighteen, thirty-four acres off the east side of the west half of the southeast quarter of section eighteen and north half of section twenty, all in township twenty, of range one west, containing one thousand and fifty acres of land, more or less, and situated and being in the county of Sumter, in the State of Alabama, with all the appurtenances, tenements, and hereditaments thereunto appertaining and belonging, and all right, title, and interest of the said defendants, or either of them, in and to the same;

And it further appearing to the court that said bid of said Bernhard Friedman for a valuable consideration has been by him transferred to A. B. McEachin and W. G. Cochrane, of the county of Tuscaloosa, in the State of Alabama, and that said A. B. McEachin and W. G. Cochrane have agreed and obligated themselves to pay the amount of said bid, namely, fifteen hundred dollars, to said assignee forthwith upon the confirmation of said sale by this court, and as soon as titles to said lands are made to them by said assignees in accordance with said decree and order of confirmation:

Now, therefore, it is hereby ordered, adjudged, and decreed by the court that said sale is hereby in all things confirmed, and that said assignee forthwith make a deed conveyance of said lands to said A. B. McEachin and W. G. Cochrane in acordance with said sale, so made, and this decree confirming the same, and that said assignee forthwith collect of said A. B. McEachin and W. G. Cochrane said bid of fifteen hundred dollars, and that said assignee forthwith report to this court what he has done as ordered and directed by this decree. And all other and further matters connected with the several matters herein adjudicated are reserved and postponed until the coming in of said report of said assignee.

John Bruce, *Judge*.

February 5th, 1883.

Filed the 5th day of February, 1883.

J. W. Dimmick, *Clerk*.

I hereby certify the foregoing to be a true and correct copy of the original petition for said decree confirming sale in the above-stated cause, as remains on file in my office.

Witness my hand and seal of the United States District Court this 12th day of May, A. D. 1887.

[seal.] J. W. Dimmick,
Clerk U. S. Dist. Court, Mid. Dist. of Alabama.

ments, and hereditaments thereunto appertaining and belonging, and all right, title, and interest of the said defendants, or either of them, in and to the same;

And it further appearing to the court that said bid of said Bernhard Friedman for a valuable consideration has been by him transferred to A. B. McEachin and W. G. Cochrane, of the county of Tuscaloosa, in the State of Alabama, and that said A. B. McEachin and W. G. Cochrane have agreed and obligated themselves to pay the amount of said bid, namely, fifteen hundred dollars, to said assignee forthwith upon the confirmation of said sale by this court, and as soon as titles to said lands are made to them by said assignees in accordance with said decree and order of confirmation:

Now, therefore, it is hereby ordered, adjudged, and decreed by the court that said sale is hereby in all things confirmed, and that said assignee forthwith make a deed conveyance of said lands to said A. B. McEachin and W. G. Cochrane in acordance with said sale, so made, and this decree confirming the same, and that said assignee forthwith collect of said A. B. McEachin and W. G. Cochrane said bid of fifteen hundred dollars, and that said assignee forthwith report to this court what he has done as ordered and directed by this decree. And all other and further matters connected with the several matters herein adjudicated are reserved and postponed until the coming in of said report of said assignee.

JOHN BRUCE, *Judge*.

FEBRUARY 5TH, 1883.

Filed the 5th day of February, 1883.

J. W. DIMMICK, *Clerk*.

I hereby certify the foregoing to be a true and correct copy of the original petition for said decree confirming sale in the above-stated cause, as remains on file in my office.

Witness my hand and seal of the United States District Court this 12th day of May, A. D. 1887.

[SEAL.] J. W. DIMMICK,

Clerk U. S. Dist. Court, Mid. Dist. of Alabama.

122-132

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

NO. 216.

Edward Warren and wife, and others,
APPELLANTS.

VS.

Frank S. Moody and Richard McClester, assignees, in bankruptcy of John S. Kennedy,
APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

ARGUMENT OF JOHN T. MORGAN,

Att'y for Appellants.

WASHINGTON. D. C.:
T. W. STUBBLEFIELD, Printer.
Norris Building, 501 F Street.

Supreme Court of the United States.

OCTOBER TERM, 1886.

EDWARD WARREN and wife, and others, *Appellants*,

vs.

FRANK S. MOODY and RICHARD McCLESTER, *Assignees*, in Bankruptcy of JOHN S. KENNEDY, *Appellees*.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

Argument of John T. Morgan, attorney for appellants:

STATEMENT OF THE CASE.

This case comes to the Supreme Court of the United States on appeal from the decree of the circuit court of the United States for the middle district of Alabama, rendered December 1, 1881.

That decree was rendered upon the record of the proceedings in the District Court for said district (sitting as a court of bankruptcy, in equity), upon the appeal of the defendants in that suit. The decree of the Circuit Court is that it is ordered, adjudged and decreed by the court "that the said appellees are entitled to the relief they seek, and that the decree of the district court appealed from in this cause be, and the same is, hereby, in all things affirmed."

After the case reached the Circuit Court the original bill was amended in a feature, that was essential to its equity, against the objection of the defendants in the suit.

No additional evidence was taken in the Circuit Court, which exerted, in its decree, *only its appellate jurisdiction in this case*, so far as appears from the record

The original bill was filed on the 23d July, 1878, by Moody and McClester, as the assignees in bankruptcy of Baugh, Kennedy & Co., and of John S. Kennedy on the equity side of the District Court, sitting in bankruptcy.

It seeks to set aside and vacate a deed of lands made by John S. Kennedy and his wife, Mary E. Kennedy, to their daughter, Vernon K. Warren, bearing date on the 31st December, 1866. The prayer of the bill is "that said deed be declared null and void, and that the same be vacated by the decree of this court, and that said lands be sold by your orators, and the proceeds thereof be administered by them as a part of the estate of John S. Kennedy, in bankruptcy, and for such other and further, or different, or general relief as the pleadings and proofs may warrant, or as to your honor may seem meet."

The bill states "that the said John S. Kennedy, prior to his adjudication of bankruptcy as aforesaid, to wit, on the 31st December, 1866, together with his said wife, Mary E. Kennedy, was seized and possessed of the following described real estate"—the same sought to be sold as the property of John S. Kennedy, bankrupt, under the bill filed in this cause. (Record, p. 1.)

The amendement to the bill which was presented for the first time in the Circuit Court, after the case went to that court on appeal, and to which the defendants (appellants in that court) objected, is set forth on page 29 of the record, it is as follows: "Third, complainants aver that the only interest which Mrs. Mary E. Kennedy, the wife of said John S. Kennedy, ever had or owned in said lands was an incohate right of dower, and that she signed said deed with her said husband, John S. Kennedy, simply for the purpose of relinquishing her said dower interest, and for no other purpose."

The bill sets out a list of debts which John S. Kennedy owed at the date of this deed, and afterwards, and before it was acknowledged, namely :

To Martha E. Harrison, minor,	$729	49
" Wiley A. Harrison. "	1,590	42
" Mary A. Ingram, Executrix,	1,765	10
" M. J. Herbert,	1,000	61
" Martha Coyn,	1,070	09
" R. M. Kilburne,	236	00
	$6,391	71

Herbert's debt is not proven against the estate of the bankrupt. The deed of Kennedy and wife to Mrs. Warren is set out on p. 4 of the record. It is not witnessed, it is dated 31st December, 1866, was duly acknowledge on the 7th October, 1867, and was recorded March 29th, 1872. Kennedy's petition in bankruptcy was filed July 1, 1876, and he was adjudged a bankrupt on July 7, 1876.

On page 25 of the record, is set out an agreement of counsel, made and filed in the district court as follows: "Moody and McClester, assignees, *vs.* Edward Warren and wife, *et al.*"

"It is admitted that the facts set forth in the answers are substantially true, except so far as controverted by the depositions and other evidence in the cause." And the case was submitted "on the answers of the defendants under said agreements," along with other evidence in the cause. Warren and wife adopted the answer of Kennedy and wife. (Record, p. 14.)

There is not the least conflict between these answers and the other proofs offered in the case.

The answers therefore prove that the deed of Kennedy and his wife to Mrs. Warren, their daughter, was followed immediately by the actual possession of the land by the grantee, her husband acting as her agent to rent and repair the land, and that she continued to enjoy the same, (until the lands were seized by order of the bankrupt court), exclusive of any use, or benefit to said Kennedy, or his wife, or any claim of right, or title, on the part of either of the grantors in the deed.

The deed was delivered to Mrs. Warren on the day it bears date, which was the 11th day after her marriage with Mr. Warren, and the consideration of ten dollars was in fact paid to the grantors.

The deed, however, expresses a more substantial consideration in these words "*The foregoing conveyance is intended as an advancement to our said daughter*." Accompanying this is a full covenant of warranty of title to Vernon K. Warren.

Kennedy, in his answer, which is evidence as to all statements contained in it, by stipulation of the parties, explains the character of his indebtedness at the date of the deed ; his ability to pay his debts, some of which he was prevented from paying because there were no persons to whom they could lawfully be paid; his prosperity, and a statement of his then available assets ; and his failure, and the causes that led to it subsequent to that period.

All the defendants deny all intent to defraud creditors in the making or acceptance of this conveyance, and Kennedy sets forth a list of his property and credits to show the improbability of his havnig any other than an honest purpose in making the conveyance to his daughter so soon after her marriage.

On pp 12 and 13 of the record is a schedule of real and personal property and choses in action of John S. Kennedy, which he owned December 31, 1866, and their value at that date. It foots up $91,900.00, not including the land conveyed to Mrs. Warren. Some of the debts he was bound for, as is shown in the bill of complaint, were the firm debts of wealthy copartnerships of which he was a member.

The bill nowhere states the value of the lands conveyed to Mrs. Warren either in 1866, when the deed was executed, or in 1878, when the bill was filed.

The two witnesses who state the value of the land, in December, 1866, are C. D. Walker, and C. M. Silliman. Walker, a farmer and merchant, who is evidently the best informed, fixes the value, then, at six dollars per acre. Silliman, a practising physician, is uncertain as to its cash value. He says "I would say from eight to ten dollars per acre." There are 1,056 acres in the tract worth somewhere between $6,333.00 and $10,000.00 in 1866.

Kennedy was then worth over $100.000, and owed on his personal account, to minors for whom he was guardian, with bonds to secure their estates in his hands, about $2,360.00, and to Mrs. Herbert, who could only receive the interest on the debt, $1,000.00, in all amounting to less than $3,400 00. "They (the defendants in their answers) aver that at the time of making said conveyance, viz: on 31st December, 1866, they were in prosperous circumstances and possessed ample means to pay all debts, and were able to withdraw the value of said donation from their estate without the least hazzard to their creditors." They also state other facts which support this statement. (Record pp. 11 and 12.)

The bill contains no averment that this 1,056 acres of land is worth more than the debts which Kennedey owed, as to which it is alleged "that said deed, being wholly voluntary, is under the laws of Alabama absolutely void, as against the debts herein above mentioned, and, as against your orators, who, as such assignees, represent said debts for the purposes of this suit."

The decree of the district court does not follow the prayer of the bill as to the specific relief sought therein, but holds the proceeds of the sales in the hands of the assignees, "subject to distribution among the creditors of said bankrupt, under the orders and directions of this court, according to the respective rights and priorities of such creditors" "*of the said Vernon K Warren and Edward Warren*," as it is in the record (p. 26); but this is supposed to be a clerical misprision, and was intended to mean the creditors of the bankrupt. In no sense is it a decree in favor of any preferred, or special creditors.

On this Record the Appellants Assign the Following Errors:

1. The Circuit Court of the United States for the middle district of Alabama, erred in rendering a judgment which affirmed the judgment and decree of the District Court in said cause.

2. Said Circuit Court erred in refusing to reverse the decree and judgment of the said District Court in said cause, upon the facts apparent on the face of the record.

3. Said Circuit Court erred in its refusal to dismiss, or order the said District Court to dismiss, the bill of complaint in said cause for the want of equity and for the want of jurisdiction to hear the same.

4. Said Circuit Court erred in its refusal to reverse the decree of said District Court, and to order said bill of complaint to be dismissed on the pleadings and proofs in said cause, as the same appear on the record therein.

5. Said Circuit Court erred in affirming the judgment and decree of said District Court, setting aside and annulling the deed mentioned in the decree of said District Court, when it appeared from the pleadings and proofs in said cause, that the grantees in said deed had, in good faith, held the adverse possession of the lands in said deed conveyed, for the period of more than ten consecutive years before the bill of complaint in said cause was exhibited, or filed in the District Court.

6. The said Circuit Court erred in allowing the amendment of the bill of complaint, in this cause, so as to change entirely the allegations of the original bill, by the introduction of new averments and statements into the same, that are repugnant to the averments and statements of the original bill.

7. The said Circuit Court erred in this, that said court permitted the original bill of complaint in this cause to be amended, while the same was pending on appeal from the judgment and decree of the District Court of the United States, and thereupon, and on the record, as so amended, proceeded to affirm the judgment and decree of said District Court, rendered on a different record and different state of proceedings, and ordered the execution of said decree of said District Court

8 The said Circuit Court erred in affirming the judgment and decree of said District Court in said cause, in this, that in said decree no provision is made by which Vernon K. Warren is permitted to pay off the creditors of said Kennedy, whose debts were contracted prior to the date of the deed, ~~there is~~ admitted in the bill to be valid

that are

as to creditors whose debts are subsequent, in date, to said deed. Nor does said decree of the district or circuit court ascertain the names of, or the sums due to, the creditors of the bankrupt before the date of said deed, so that Warren and his wife could relieve their property by paying said debts.

Nor does said decree of either of said courts provide any time within which the defendants, or any of them, should be allowed to releive their land, or to remove the debts, as to which the bill alleges that the deed is void.

9. The original proceeding in this case, while it is nominally a suit in equity to annul a conveyance is, in fact, a suit at law to recover the land from Warren and wife, the trial of which requires a jury.

10. The Circuit Court erred in rendering a decree in favor of the assignees, in bankruptcy, of John S. Kennedy on a cause of action that accrued in favor of said assignees more than two years befcre the suit was brought.

ARGUMENT.

1. It was error in the Circuit Court to allow an amendment of the bill, upon which the case had been tried in the District Court.

The appeal in an equity cause, in bankruptcy, is to be tried on the record of the District Court, as in any other equity case. The appeal does not give the Circuit Court the jurisdiction to exercise its revisory powers under the bankrupt law, nor the power to try the cause *de novo*.

Smith vs. *Mason*, 14, Wall, 419.

As the appellate court must hear and determine the case on the record as it existed in the District Court, it cannot allow the case to be opened in the appellate court, and the bill to be amended and the cause to be again heard upon the pleadings and proofs.

The amendment that was allowed in the Circuit Court did not cure the fatal defect in the original bill. That trouble was, that it was stated in the original bill, that Kennedy and wife, when they conveyed the land to Mrs. Warren, were "seized and possessed" of the land, which, of course, was a statement of complete title in them jointly.

The amendment left these words in the bill, but undertook to limit their signification by adding that "the only interest which Mrs Mary E. Kennedy, the wife of John S. Kennedy, ever had or owned in said lands was an incohate right of dower." This may be true as to the interest she had in the lands, as against her husband, and yet that she held some deed or other title, which gave her lawful seizin and possession of the lands, as the bill still continues to allege, since the amendement was added to it, as it did before.

2. This is a suit in equity, in one aspect, to set aside and annul a conveyance, that is supposed to stand in the way of a recovery of the land, *and to recover the possession of the land.*

If the deed is fraudulent and void as to the creditors of one of the grantors in the deed (the other having no title to the land) and if the action was ejectment in a court of law, the proof of these facts before a jury would entitle the plaintiff to recover the land. There is no ground of equitable relief in the case which cuts off the defendant, Mrs. Warren, from the right to have a jury to pass upon the facts in the case. It is simply an action of ejectment, in a court of chancery, that is brought in the bill filed in this cause.

The other powers of a bankrupt court appealed to in the bill, viz: to sell the land and distribute the proceeds to the creditors entitled, are the ordinary statutory powers of the judge of the district court, under the Bankrupt Act, which are exercised on petition or motion, and do not comprise any part of the equitable jurisdiction of the court.

3. Section 14, of the Bankrupt Act, in the language of its first clause, viz: "and thereupon by operation of law the title to all such property and estate, both real and personal, shall vest in the said assignee," and in the language of the third proviso, viz: "And all the property conveyed, by the bankrupt in fraud of his creditors * * * * shall in virture of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee," makes a resort to equity to set aside a fraudulent conveyance by the bankrupt, utterly useless. So useless a proceeding cannot lawfully take from the defendant the right to have a jury trial on the title to his land.

4. On the evidence in this case, and also under the pleadings, the court could not properly annul the conveyance from Kennedy and wife to Mrs. Warren. Whether, or not, it conveyed to her a title freed from liability to satisfy the debts that John S. Kennedy owed when the deed was executed, it conveyed such a title as to all subsequent creditors and as to Kennedy and wife It was a legal title as to everybody, and a perfect title in equity as to everybody, except existing creditors. When their debts were paid, either by her, or her father, her title would become perfect in equity and law against everybody. Such a deed, which the bill admits is valid as to Kennedey and wife and all his creditors who became such after the deed was made, cannot be set aside and annulled as a conveyance or muniment of title, and a bill for that purpose contains no equity.

5. The conveyance sought to be set aside and annulled, in this case, is not of the class intended to be annulled "by operation of law" in the Bankrupt Act, nor does the property conveyed in such a deed, "in virture of the adjudication in bankruptcy," become "at once vested in" the assignees of a bankrupt.

A deed, valid as to the bankrupt and all his creditors, except those of a date older than the deed, stands in the way of this vesting of property in the assignee by operation of law, and equally in the way of the right of the assignee to recover it as part of the bankrupt's estate. It is not property of the bankrupt, encumbered by his act; but property of Mrs. Warren held subject to an incumbrance created by the law, because the bankrupt owed debts when he made the deed. When it is relieved of the incumbrance, the perfect title is in Mrs. Warern, and not in her father, or his assignee in bankruptcy.

6. The conveyances annulled by Sec. 14 of the Bankrupt Act are such as are made "by the bankrupt in fraud of his creditors." Not such as defraud others who are not creditors, nor such as defraud certain creditors and, being honest in fact and intent, are valid as to all other creditors; nor such as are not affected with any fraud or covin, and are good between the parties.

As the assignee holds the same legal relation to every creditor who may prove his debt, and is the representative alike of all of them to collect and distribute the estate of the bankrupt, a fraudulent conveyance by the bankrupt, which the assignee can disregard, is one that is void as to all persons who belong to the class of creditors of the bankrupt. All conveyances tainted with fraud are of this class, but some deeds, that are not tainted with actual fraud, are void by statute, as it respects certain persons, and are good as to all others.

The law does not by its own operation make these deeds void, so as to vest the property conveyed by them in the assignee of a bankrupt.

The case of *Stewart* vs. *Platt* (101 U. S., 731,) gives a very direct and strong support to the proposition that this deed of Kennedey's and wife to Mrs. Warren is not of the class of "fraudulent conveyances," which it is the purpose of the Bankrupt Act to give the assignee the power to set aside, or annul, at his election. If he may represent ~~to~~ the bankrupt and his creditors in such an election, he cannot represent a person holding the property, honestly, in adverse interest, nor a creditor holding against the property a right of equitable satisfaction of a debt.

7. The definition of the rights which pass to the assignee of a bankrupt has been clearly made in the decisions of the Supreme Court of the United States. They do not seem to include rights as unsubstantial as those set up in the bill of complaint in this case.

"In *Stewart* vs. *Platt* (101 U. S., 731,) it was held that although the chattel mortgages, (involved in that litigation,) by reason of the failure to file them in proper places, were void, as against judgment creditors, they were valid as between the parties. Mr. Justice Harlan, delivering the opinion of the court, said: 'The assignee took the property subject to such equities, liens or incumbrances as would have effected it had no adjudication in bankruptcy been made. * * .* The latter (the assignee) representing general creditors, cannot dispute such claims, since, had there been no adjudication, it could not have been disputed by the mortgages. The assignee can assert in behalf of the general creditors no claims to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee.'"

Hauslet vs. *Harrison*, 105, U. S., p. 406.

This rule of law has been variously applied to bills and decrees in equity, at the suit of assignees, and to various actions at law brought by assignees in bankruptcy.

In (*Dudly* vs. *Easton*, 104 U. S., p. 103) Chief Justice Waite delivering the opinion of the court, said:

"He (the assignee) has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for them to interfere in order to settle their rights in the general estate, or to determine whether there is an excess of property over what is required for the purposes of the security."

In *Yeatman* vs. *Savings Institution* (95 U. S., p. 766), Mr. Justice Harlan quoted approvingly in delivering the opinion of the court, the following, from Goddard *vs.* Weaver, 1 Wood, 260: "the assignee takes only the bankrupts interest in property. He has no right or title to the interest which other parties have therein, nor any control over the same, further than is expressly given to him by the Bankrupt Act, as auxiliary to the preservation of the bankrupt estate for the benefit of his creditors. It would be absurd to contend that the assignee in bankruptcy became *ipso facto* seized and possessed in entirety, as trustee, of every article of property in which the bankrupt has an interest or share." "These views," continues Mr. Justice Harlan, "find direct support in more than one provision of the Bankrupt Act."

The case of McHenry *vs.* La Societe Francaise (95 U. S., 58), is also in point, as to the powers of assignees in bankruptcy over the rights of other persons in property incumbered by the bankrupt in transactions that are not violative of the Bankrupt Act Their rights are limited by their duties to the estate remaining in the bankrupt when he is so declared, and they cannot interfere except to recover that property, or to increase its value by re-moving incumbrances, or in some other way, so that it will yield something to the value of the bankrupt estate.

In this case, the assignees make no claim that the estate will gain, by their interference, anything above the sum needed to pay off the debts owing by Kennedy on December 31, 1866, and they treat the deed made on that day as being simply void as to such creditors, and not as to any whose debts are of later date.

Thus is presented a case in which no right in, or control over this land, is expressly, or by the most remote implication, given to these assignees by the Bankrupt Act.

Even the creditors, as to whom the statute of Alabama declares the deed fraudulent and void, could not maintain a suit to declare the "deed null and void and that the same be set aside and vacated." After their debts are satisfied, the deed is entirely valid as to all others, and they have no occasion to have it vacated and annulled so as to get all they are entitled to receive out of the land conveyed in the deed. They have no right to reinvest Kennedey with the title to the land, as against Mrs. Warren, because they have an equitable or legal lien upon it, to satisfy a debt that Kennedey owes them.

For much stronger reasons, the assignee, in bankruptcy, of Kennedey has no such right.

8. The rights of the assignee in bankruptcy are all given by statute. They have not the support of a "good consideration" or of a moral obligation which arises, *ex aequo et bono*, when rights are derived under contract, or by inheritance, or from conveyances and assignments between persons.

Was it the purpose of the statute to place it in the power of assignees to claim debts and property for the bankrupt which were out-lawed by the lapse of time, under the wise policy of the law, at the time of the declaration of bankruptcy?

In contemplation of law, the title to this land was complete in Mrs. Warren, as against Kennedy and wife, and against their creditors, who afterwards became such, by the force of the deed, and she did not need the protection of the statute of limitations as to them. If an interest in the lands remained in the antecedent creditors, which they could enforce, it could only have been done by suits at law, or in equity, to collect their debts out of this property. To such suits Kennedy could plead the statute of limitatations, but Mrs. Warren, not being a party, or not having the right so to plead, could not; such pleas being personal to the debtor.

She can only rely upon the statute of limitations of ten years to protect her title and possession of the land, while Kennedy, if he had been sued on these debts, could have protected her absolutely by pleading the statute of limitations of six years, which would bar all recovery of judgments upon them.

Does the Bankrupt Act give to these assignees the right to waive the effect of the six years statute of limitations because they represent the estate of Kennedy, and to compel Mrs. Warren to resort to her plea of ten years adverse possession of the land? Does the act also give them the right to represent the creditors of Kennedy, if their debts were barred by the statute, and to compel them to attempt to collect their debts, notwithstanding they are barred?

9. If Mrs. Warren must lose the benefit of her defense, unless it is formally pleaded or set up in her answer, that she has held the possession of this land under a *bona fide* claim and color of title for more than ten years before this suit was brought (*vide code of Ala.* 1852, *Sec.* 2,476); still this record shows that she did insist upon that defense. She adopted the answers of Kennedy and wife to the bill, and the stipulation of counsel (record p. 25) makes these answers evidence in the cause.

In adopting the joint answer of Kennedy and wife, Mrs. Warren and her husband "plead the facts in said answer set forth as a bar to the suit of complainant's against these defendants, and they pray for all the benefit of the defenses in the said answer relied on and set forth, but they do not plead the statute of limitations, *unless* that defense is *sufficiently set up* in the said answers of Kennedy and wife."

Kennedy and wife could not plead this statute of limitations, based upon ten years adverse possession of the land, for their answer stated that more than ten years before the suit was brought they had conveyed the land and delivered the possession to Mrs. Warren. Neither could they set up that defense in their answers. That plea and defense was personal to Mrs. Warren.

The facts to support the plea were sufficiently stated in the answers of Kennedy and wife. Mrs. Warren did "plead the facts in said answer, set forth as a bar to the suit." And this was the interposition of the defense of the statute of limitations, if the facts set forth in the answer of Kennedy and wife were sufficient in law to support the plea, or the defense.

They certainly called attention to this defense in their answer, and adopted the answer of their co defendants, which fully stated the facts upon which the defense rested. They did not waive that defense; but, relying on the facts stated in the answers they had adopted, agreed that they would not "plead the statute of limitations, *unless that defense* (which means the facts on which it rests) is sufficiently set up in the said answers of Kennedey and wife."

If those facts are sufficiently stated in the answer adopted by Warren and wife to support the plea, the defense is sufficently "set up" in the said answers of Kennedey and wife, who had no right to plead the statute of limitations, and they are pleaded in bar of the suit in the answer of Warren and wife.

This answer is evidently a part of a stipulation of counsel (Record, p. 14), and was intended to present, by agreement rather than in the form of a pleading in the cause, the facts and points on which Warren and wife relied for defense against the bill. This stipulation is very irregular, but resembles a form of consent of counsel that is very common in practice in the law courts of Alabama, by which "the general issue is pleaded; in short, by consent, with leave to give in evidence any matter that could be specially pleaded to the action, or replied by the plaintiff, as if the same had been specially pleaded or replied." This form of pleading is encouraged by those courts.

It would be a peculiar wrong to Mrs. Warren to cut her off from the benefit of this plain and very just ground of defense to this suit, which was never intended to be surrendered, because of an awkwardness of expression in a stipulation of counsel relating to the plea of the statute of limitations.

Why should the plea have been mentioned in the agreement, if there was only an intention to waive or abandon it?

9. As has been stated above, the original bill in this cause stated that John S Kennedy together with his said wife, Mary E. Kennedy, "was seized and possessed of" the land sued for when they conveyed it to Mrs. Warren, and there was no statement in the bill to qualify this perfect joint ownership. Until this statement was changed there could be no occasion to plead the statute of limitation, or any other plea, as to the moiety conveyed by Mrs. Kennedey nor, indeed, to the other moiety, as the bill claimed all the land and the prayer was to vacate and annul the deed as to all of it.

A valid decree for the complainants in this cause was a legal impossibility, until the bill was ammended, and that was not attempted until after the appeal was pending in the Circuit Court. Final action was not had on the allowance of the amendment until December 1, 1881, and on the same day a decree *pro confesso* was entered "*on said bill, as amended by said amendment*," against "*the said appellants*' " as to all matters and things, as alleged in said amended bill," notwithstanding their answers on file in the cause. On the same day a final decree was rendered in the Circuit Court affirming the decree of the District Court.

This confused admixture of original and appellate powers and jurisdiction was so hastily compounded, that no day in court was allowed to Mrs. Warren to present her defense of the statute of limitations, either by plea or answer; when, for the first time, it was necessary that she should make any other defense than such as was sufficiently disclosed on the face of the original bill.

10. But courts of equity, acting on the analogy of the statute of limitations, reject claims that are barred, as stale demands. They make no sufficient appeal to the conscience of the court and are not allowed to become the basis of a bill claiming equitable relief. "To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief. Every case is governed by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; and in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the

inherent principles of its own system of jurisprudence, and to decide accordingly."

Sullivan vs. *Portland, etc., R. R. Co.*, (94 U. S., p, 811.)

The analogy of the statute of limitations of ten years, under the laws of Alabama, would certainly do no injustice to the creditors of Kennedy, who were such before he conveyed this land to his daughter, as they never made any movement to condemn this land to their debts, and do not appear to have shared the zeal of the assignees in bringing it to sale. More than two years elapsed between the declaration of bankruptcy and the bringing of this suit, and it is barred by the Bankrupt Act, if the right of action accrued at the time of the declaration, or relates back to it from the date of the appointment of the assignees. Counting from that date, there remained but two days of the two years within which the assignees could sue for this land. They were appointed 28 July, 1876, and the bill was filed July 25, 1878. It was not attempted to be amended so as to present the semblance, even, of a case for relief until July 6, 1881. Three years after the bill was filed; after a final decree was rendered in the cause, and it was pending on appeal in the circuit court, these assignees first bestir themselves to make a new case on a state of facts that had been of record for, then, more than thirteen years.

The application of the equitable doctrine of laches to the amendment of this bill is obvious.

11. Mrs. Warren's connection with this transaction, as was that of her father and mother, was innocent, natural and praiseworthy. The whole plan of her life after her marriage was conformed to the sincere belief that her land, which she accepted as an advancement from honorable and worthy parents out of an ample estate, was free from all incumbrance.

Ten years later misfortune overtook her father, chiefly in the burning of extensive cotton mills, and he went into voluntary bankruptcy. His creditors did not resort to the land of Mrs. Warren for the debts contracted before the deed was made, and they never asked the assignees to do so. After waiting until within two days of the time when they should have had the bankrupt's estate ready for distribution, they bring this suit, declaring that they do it, not for the benefit of the estate of the bankrupt, but because "said deed being wholly voluntary, is *under the law of Alabama,* (not the Bankrupt Act) *absolutely void,* as against the debts herein above mentioned, and as against your orators, who, as such assignees, *represent said debts for the purpose of this suit.*"

And so, the estate in bankruptcy is not to be distributed at the end of two years, but, within two days of that time, it must be launched into expensive litigation to recover, for some of the creditors, debts that they had not attempted to recover, that the assignees may sell the land, and "*the proceeds thereof be administered by them as a part of the estate of John S. Kennedy in bankruptcy.*"

The purposes of the assignees, thus disclosed, are purely selfish and mercenary ; they have no relation to duty, or to the benefit of the estate; they can only result in delay and unnecessary expense in the settlement of the estate; and they deserve punishment, rather than indulgence.

Mrs. Warren surely has the right to insist that a court of equity, which " nothing can call forth into activity but conscience, good faith, and reasonable diligence," will not aid this rapacious effort to seize and sell lands that she has held in good faith for so many years, in this summary way. To her, it is a sudden and ruthless tearing up of the foundations of all her plans in life, while, to the assignees, it is a seeking for commissions, and allowances to their attorneys, in order to increase their own fees for administering the bankrupt estate, through an abuse of the powers and discretion given them by law.

12. The case of Foote and wife *vs.* Cobb, 18th Ala. Rep., 585, states the attitude of the Supreme Court of the State on the question of operation of the Statute of Frauds upon a voluntary conveyance of property by one indebted at the time of the conveyance.

The opinion admits that the court stands almost alone among the American States in their decision.

That decision declares the law of Alabama, and has not been overruled; but the conveyance is void only as to the person defrauded. (See Code of 1882, Sec. 1554.)

Accepting it as such, is the Supreme Court of the United States bound to accept that ruling as conclusive of the question, when it is raised under a statute of the United States which annuls fraudulent conveyances of property by a bankrupt, and, by operation of law, conveys such property to assignees? Congress had no such purpose in enacting the Bankrupt Act of 1867, as to reenact the statute of frauds, with the Alabama interpretation of them. Nor did Congress intend, "by operation of law," to convey to assignees any property which the bankrupt had conveyed by deed, in good faith, and without any fraudulent intent, or purpose.

If this act had any reference to the statutes of fraud in the several states, the duty of making a uniform law of bankruptcy, and a just law, would lead to the conclusion that Congress intended to affirm the validity of such conveyances as are denounced by the Alabama decisions, when the disproportion is so great between the debtors property and his indebtedness, as to preclude the idea of fraud, or the idea that the law intended to create the conclusive statutory presumption of fraud, or covin, in the transaction, Much more forcible is the reason for such a construction, when, as in this case, the evidedce is direct and convincing that there was no fraud intended, and the donation, if it be such, had reference to the making provision for a daughter, then recently married, by wealthy and prosperous parents.

13. The case of Foote and Wife *vs.* Cobb, 18 Ala. Rep. is pregnant with suggestions of the court in the direction of sustaining such conveyances, as against existing creditors, where the conveyance is supported by any actual consideration, or moral obligation. There is an actual money consideration in this case, though it is greatly disproportioned to the value of the property. But, another consideration is recited in the deed which presents mutuality of obligation between the parties to the conveyance, in the bestowment and acceptance of this land as an advancement to the child from the estate of her parents.

The moral obligation of an ante-nuptial agreement is not stronger than the duty of a parent to provide for his child out of his estate; and such ante-nuptial agreements are uniformly decided to be a good consideration for a just post-nuptial conveyance to the wife.

An advancement must be counted as so much of the estate of the parent when it comes to be distributed to his children, and must be reckoned at its value at the time it is made, although, from any cause, it may have greatly shrunk in value when the distribution is made.

The acceptance of an advancement with an agreement that it is such and is to be so held and accounted for, and is not a free gift, is quite a different thing from accepting a merely voluntary conveyance without any after consequences. The agreement that it is an advancement would be so far an agreement upon a good consideration, that the child, so advanced, could compel the estate of his father to perform the covenants of warrantry in the deed and free the property from incumbrance, if he was held, as he would be, to accept the land as so much of his share of his father's estate.

A deed with such mutual covenants and agreements, followed by the delivery of the possession of the land, is not entitled to be classed among conveyances that are purely voluntary.

14. As a bill in equity to set aside a deed for fraud, this suit cannot be maintained, for the deed is admitted to be valid as to Mrs. Kennedy, and as to Kennedy's creditors, who became such after it was executed. As a muniment of title, and as to the covenants it contains, it is also a valid instrument in the hands of Mrs. Warren.

Besides, no fraudulent conveyance is in the way of an assignee in bankruptcy, who takes the title to property, so conveyed, in spite of the deed, "by operation of law." The law by its own operation annuls and sets aside such a deed, and it needs no help from a court of equity for that purpose.

As a bill in equity to recover, land adversely held by Mrs. Warren, this suit is simply an action of ejectment in a court of chancery.

As a bill in equity to sell the land sued for, or to distribute the proceeds of the sale, it has no place in the equity powers of the District Court of the United States, in bankruptcy, as the statutory powers of that court are quite sufficient for these purposes, without any necessity for resorting to its powers as a court of equity.

All this could be done by the bankrupt court on petition, or motion by the assignee, if the law operated *proprio vigore* to vest the title of the land in the assignees.

If such is not the effect of the Bankrupt Act, but the assignees must sue to recover the land, Mrs. Warren has done nothing to cloud the title in accepting a "void" conveyance, and she is entitled to have a jury trial as to her title, and as to any damages by way of rents, that have been, or may be claimed of her, by the assignees in bankruptcy, of the grantor in the deed.

JOHN T MORGAN,
Attorney for the Appellants.

122-132

[illegible]
FILED
MAY 26 1887
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM 1886.

EDWARD WARREN and VERNON K. WARREN, his Wife, and JOHN S. KENNEDY and MARY E. KENNEDY, his Wife, Appellants,
vs.
FRANK S. MOODY and RICHARD C. McLESTER, Assignees in Bankruptcy of BAUGH, KENNEDY & CO. and JOHN S. KENNEDY.

No. 216.

Appellee's Brief in Support of Motion to Dismiss.

Statement.

The bill was filed July 25, 1878. The decree of sale by the District Court was rendered July 9, 1880. The final decree by the Circuit Court was rendered December 1, 1881. The sale took place . The order of the court confirming the sale was made February 5, 1883. The order allowing the appeal to this court was made November 22, 1883.

Points.

The appeal was not to operate as a supercedeas. The purchase was made by a stranger to the decree, and it is well settled that when a stranger to a judgment or decree, the execution of which has not been suspended in the mode prescribed by the statute, becomes a purchaser under it, either prior to or pending an appeal from it, his title will not be impaired by a subsequent reversal, the court having jurisdiction to render the judgment or decree. (Marks *v.* Cowles, 61 Alabama, 304; Freeman on Judgments, section 484; Freeman on Executions, section 345.)

Such is the law of Alabama. Hence the land is removed from the controversy, and the purchase-money becomes the subject of the controversy. The transcript filed in support of this motion shows the amount of the purchase-money to be $1,500. The sale took place and was confirmed prior to the appeal, and the transcript now filed is properly a part of the record.

MICHAEL L. WOODS,
Attorney for the Appellees.

122-132

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 216.

EDWARD WARREN and wife, and others, *Appellants*,

vs.

FRANK S. MOODY and RICHARD McCLESTER. *Assignees*, in Bankruptcy of JOHN S. KENNEDY, *Appellees*.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

ARGUMEMT FOR APPELLEES FILED BY

M. L. WOODS and WM. S. THORINGTON, ESQS.

Supreme Court of the United States,

OCTOBER TERM, 1886.

EDWARD WARREN and wife, and others, *Appellants*,

vs.

FRANK S. MOODY and RICHARD McCLESTER. *Assignees*, in Bankruptcy of JOHN S. KENNEDY, *Appellees*.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

Argument for appellees filed by M. L. Woods, and Wm. S. Thorington, Esqs.

I.

AS TO THE AMENDMENT TO THE BILL ALLOWED IN THE CIRCUIT COURT.

Section 954 of the U. S. Rev. Statutes, as construed by the courts, applies to appellate as well as original proceedings, and is sufficiently broad in its terms to cover this case.

Kennedy et als v. Georgia State Bank, 8 How. U. S., pp. 610–611.

Anonymous, 1 Gallison, pp. 22–26.

2 Abbott's Practice, U. S. Courts, p. 220.

Houseman v. Schooner, &c., 15 Pet. 50-51.
Bamberger v. Terry, 13 Otto, 43.

The subject-matter of the controversy in the District Court was the land—it was the same in the Circuit Court, and the amendment did not make any change in this subject-matter, nor make a new case at all, but simply explained the averment of the original bill as to the ownership of the property, and made the pleadings conform to the proof. The substantial issues in the cause were whether the deed of December, 1886, was voluntary, and whether there were debts existing, as averred in the bill, when the deed was made, and the amendment made no change in those issues.

Houseman v. Schooner, &c., 15 Pet., 50.
Bamberger v. Terry, 13 Otto, 43.

In respect to the subject-matter of this suit, the District Court and the Circuit Court were courts of concurrent jurisdiction; and in this view of the case the reasons for allowing the amendment are stronger than they might have been if the Circuit Court had been confined to a strictly appellate jurisdiction. The above authorities, however, sustain the amendment without reference to the fact of concurrent jurisdiction.

It was in the discretion of the Circuit Court on allowing this amendment, or even on overrulling the motion of appellants, Warren and wife, to strike the amendment from the file, to vacate the submission of the cause, and grant time to them to file an answer and to take further proof; but there was satisfactory proof before the court that the granting of the amendment could not operate as a surprise to appellants, and the court, therefore, proceeded with the hearing; and furthermore no application for further time was made.

See affidavit of W. S. Thorington, printed record p. 30.

And it will be remarked here that the learned counsel for appellants has fallen into error as to the date of the allowance of this amendment. See page 18 of the brief of appellants' counsel where he assumes that the allowance of this amendment occurred on the 1st day of December, 1881, the date of the decree in the Circuit Court. That he is in error as to this, see page 29 of the printed record, where it appears that the amendment was filed *by leave of court* on the 6th day of June, 1881 ; and on page 31 of printed record, where it appears from the decree of the court that this amendment *was allowed* by the court on that date, viz.: June 6, 1881. It was not error, therefore, in the Circuit Court to render a decree *pro confesso* as to to the amendment on Dec. 1, 1881.

See printed record p. 31.

We will not dwell on this branch of the case, believing it to be well settled that the Circuit Court, although an appellate court as to this cause, had ample power to allow such an amendment of the pleadings as was allowed in this case.

II.

AS TO THE MERITS OF THE CASE.

The bill in this case was filed to set aside a voluntary deed made by John S. Kennedy and his wife, Mary E. Kennedy, to their daughter, Vernon L. Warren, on the 31st day of December, 1866, by which they conveyed to her a plantation in the county of Sumter, State of Alabama.

The deed recites natural love and affection as the consideration, and also that it is intended as an advancement to their said daughter.

At the time of making the deed, Kennedy, the grantor, was indebted individually to several creditors in about the aggregate sum of $3,500, and these debts, with but one or two exceptions, were filed against his estate in bankruptcy, and are represented by the appellees as his assignees in bankruptcy.

The appellants filed their answer to the bill admitting the execution of the deed at the time alleged, and that the "moving consideration" was love and affection, and that it was a "donation" to their daughter and intended as an "advancement" to her.

They also admit the existence of the debts set forth in the bill, and that they were subsisting debts against Kennedy when he made the deed. They allege that he was solvent when the deed was made, and also, that the ten dollars recited as part consideration was actually paid, and that the grantees took immediate possesion.

See Printed Record, pp. 9, 10, 11, 12.

The defenses which it appears from the answers are intended to be set up, are:

1. That Kennedy was solvent at the time he made the deed.
2. That Warren and wife had been in possession of the land since December 31, 1866.
3. That the consideration of the deed was partly valuable.
4. That the deed, if voluntary, can not be held void without proof of fraudulent intent.

The questions of law involved in this case are but few and are strikingly free from difficulty, having been clearly settled from the earliest history of jurisprudence in the State of Alabama, and the same rule having been adhered to by the courts of that State down to the present time, to-wit, that a voluntary deed is void as to existing creditors independent of all motives of fraud, and independent of the condition of the grantor as to solvency.

The principle underlying these decisions proceeds from a sound maxim of law and ethics that a "man must be just before he is generous."

The only questions in such cases are:

Was the conveyance voluntary?

Was the debt of the attacking creditor a subsisting liability against the grantor at the time the deed was made?

If these conditions co-exist the deed must fall.

Cato v. Easley, 2 Stewart's Reps., 214.
Miller v. Thompson, 3 Porter's Reps., 196.
Moore v. Spence, 6 Ala. Reps., 506.
Thomas v. DeGraffenreid, 17 Ala., 602.
Foote and wife v. Cobb, 18 Ala., 585.
Gannard et als. v. Eslava, 20 Ala., 732.
Stiles & Co. v. Lightfoot, 26 Ala., 443.
McAnally v. O'Neal & O'Neal, 56 Ala., 299.
Hubbard v. Allen, et al., 59 Ala., 283.
Anderson v. Anderson, 64 Ala., p. 403.

The case last cited contains a very full and clear exposition of the law of Alabama on this subject.

The authorities above cited leave no room for doubt as to the settled law of Alabama on this subject; and the law of Alabama governs in this case.

There are two reasons why this court will follow the Alabama decisions on this subject. The first is, that these decisions are a construction of a State statute, to-wit: § 2124, Code of Alabama, and the Federal courts will adopt the construction given to a State statute by the highest court of the State.

Pratt v. Curtis, 6 Bank Reg., 142.
Thatcher v. Powell, 6 Wheat., 119.
Polks' Lessee v. Wendal, 9 Cranch, 87.
Elmendorf v. Taylor, 10 Wheat., 152.

In the next place the decisions of Alabama on this subject have become *a rule of property in that State*, and in such cases the Federal courts, sitting there, will apply the rule as though they were State courts.

Lloyd v. Fulton, 1st Otto, 485.
Christy v. Pridgeon, 4 Wallace, 196.

Neither the mere recital in the deed that ten dollars was part of the consideration, nor the allegation in the answer that the ten dollars was actually paid can affect the case, when the other recitals of the deed and admissions of the answers are considered; for from these other admissions and recitals it appears that the ten dollars was a mere formal and nominal thing—the whole object of the conveyance and the "moving consideration" being a ***gift*** or ***advancement*** to the daughter. At law, a partial consideration, however inadequate, may support a deed alleged to be voluntary, but ***the rule is different in equity.*** A court of equity will treat the conveyance as voluntary as to the difference between the amount paid and the value of the property.

Bump on Fraud. Conv., p. 303.
Also, Felder v. Harper, 12 Ala., 612.

The answer of Kennedy and wife alleges that Warren and wife went into possession of the property as soon as the deed was made; and, also, that the parties represented by the assignees "have stood by ever since the war, say over thirteen years, and permitted one partner after another to dispose of his interest in said firm property, whilst respondent has left his interest still liable, etc., and they can not in equity and good conscience, cause respondent's private property for any part thereof, much less upon property given and sold in good faith to his said daughter in December, 1866."

Printed Record, page 11.

This language is obscure, and we can only conjecture that the object of the pleader in using it was to set up the statute of limitations as a defense to this suit. If such was the intention it is wholly insufficient for that purpose. That defense, like the defense of usury and other special defenses, must be clearly and distinctly set up by plea or in the answer. The court can not ***infer*** that it is set up, but must be enabled to see that it is distinctly set up and relied on; it must be presented in an issuable form.

Bump on Fraud. Conv., p. 545.
Sullivan v. Portland, 4 Otto, 811.

The averments above quoted do not come up to this requirement.

The averment as to possession, acts of ownership, etc., by Warren and wife, it is perfectly manifest from the remainder of the answer, were put in for the purpose of rebutting the idea of ***fraud***, and to show the deed to have been ***bona fide***, and for no other purpose; the pleader proceeded as the answer shows, on the mistaken and erroneous theory that even a ***voluntary*** deed is not void as to existing creditors unless there was an intention to hinder, delay or defraud, and the answer, in fact, avers that as a conclusion of law; it was alone with reference to this, and not to the statute of limitations that the averment of possession was made. But if the intention had been otherwise—if it had been the express intention to set up that defense by the averment above quoted, it is wholly ineffectual for that purpose. To make it good it would have had to go further, and also show that the possession had been open, notorious, continuous and inconsistent with Kennedy's title.

Shorter v. Smith, 56 Ala., 208.

And they would have had to sustain these allegations by their proof. *The only proof they have on the subject is their answer*, which complainants admit to be true so far as the averments of *facts* are concerned. While the other proof in the case shows clearly that Warren's possession *was not* of the character above described, each of the three witnesses examined by complainants, (and who were neighbors to the property), testify in answer to the sixth and seventh interrogatories that they don't know who was in possession of the property at the time, and for several years after the date of the deed, and that they observed no change in possession and ownership after the deed was made.

Printed Record, pp. 20, 22 and 23.

And when we examine the deed itself we find that it *was not recorded until March* 29, 1872.

Printed Record, p. 5.

So far, therefore, as the proof and the record shows, the possession of Warren and wife was not open, notorious and *adverse* until March 29, 1872, the time when the deed was recorded, and from that date ten years, ***had not elapsed when the bill was filed.***

The other averment that "the parties have stood by for thirteen years," etc., does not refer to the statute of limitations either expressly or by implication. In the connection in which it is used it will be seen that the object was simply to set up what the pleader conceived to be an ***equitable ground of defense.*** It goes back to a period beyond the date of the deed to the time when Kennedy had the title in his name, and when he was a member of the old firm of Baugh, Kennedy & Co., and insists that these creditors ought to have obtained satisfaction out of the property of the old firm because the old firm used the moneys which constitute the consideration of these debts, and that because all the parties composing the firm have become insolvent while these creditors were indulging him, that now it would be inequitable for them to come on his individual property. Neither Kennedy nor Warren and wife aver that appellees ought not to come upon this property because ***Warren has held it adversely for ten years***, and therefore that the bar of the statute is complete, but because it would be ***inequitable*** for Kennedy's individual property to be subjected to these debts.

This can never, by the most subtle reasoning, be tortured into a plea or defense of the statute of limitations, and even as an effort to state and aver a ground of defense, it would be amusing if it were not so shocking to justice and right. A guardian and trustee takes the funds of his ***cestui que trusts*** and permits a partnership of which he is a member to use these funds in their business, and then after the firm becomes insolvent, insists that he is not liable individually, and that the ***cestuis que trust*** must look to the partnership property! There is no equity, law, justice nor right in this.

Kennedy as guardian and trustee became individually liable when he let his partnership use these funds, and that liability remains to-day and is admitted in his answer.

From what has been said above, and from the authorities cited, we think it clearly follows that the defense of the statute of limitations is not set up either by way of plea or answer.

But if it should be held that the defense is sufficiently set up in the answer the defense can avail nothing in this case.

The statute of limitations relating to lands is ten years in the State of Alabama.

The instrument attacked by the bill in this case, although dated December 31, 1866, did not have the operation and effect of a deed, in contemplation of law, until it was acknowledged by the grantors on the 7th day of October, 1867, for there were no attesting witnesses, and under the statutes of Alabama (Code of 1876, § 2145), no instrument is a deed unless signed by the grantor and attested by a witness (or by two witnesses, where the grantor cannot write) or is acknowledged before the proper officer.

Chadwick v. Taylor, 78 Ala. 116.

Bank of Ky. v. Jones, 59 Ala. 123.

The statute, therefore, even if it should be held to have commenced running from Oct. 7, 1867, (the date of the acknowledgment of the deed), and which in contemplation of law, is the date of *this deed*, is not complete.

The assignees were appointed on the 28th day of July, 1876, and received the assignment on August 11, 1876.

See allegations of bill, page 1, printed Record.

Which allegations are admitted by the answers—Printed Record, p. 9.

The bar of the statute was not complete, therefore, by more than a year at the time the assignees received the deed of assignment. That being the case section 5057 of the U. S. Rev. Statutes gave them *two years from that date* within which to bring this action—that is, until August 11, 1878, and this bill was filed July 25, 1878, or nearly a month before the bar was complete.

Printed Record, p. 5.

The construction placed upon the above cited section of the U. S. Rev. Statutes, is fully in accord with this view. As interpreted by the courts, it may operate to extend or shorten the State statute according to the facts. For instance, if at the time of the appointment of the assignee the bar of the statute lacks only ten days of being complete, section 5057 adds nearly two years to the time necessary to complete the bar. On the other hand, if at the time of the appointment of the assignee the State statute had six years longer to run before the bar would be complete, the assignee would only have the two years within which to sue.

Peiper v. Harmer, 5 Bank. Reg. 252.

Freelander & Gerson v. Holloman, 9 Bank. Reg. 331.

These decisions hold that the two years statute begins to run from the time that the assignees are appointed—this is upon the idea, doubtless, that they receive the deed of assignment upon the same day they are appointed; for the statute provides that the two years statute begins to run from *the time the cause of action accrues* for or against the assignee, and clearly the cause of action does not accrue in favor of the assignee until he receives the deed of assignment. It is a certified copy of the assignment which the bankrupt act makes evidence of his right to sue. But in this case the result is the same whether we take the date of appointment or of the assignment.

The result is precisely the same if the statute should be held to have run from December 31, 1866, the date on which the answer avers Warren and wife went into possession. Ten years from December 31, 1866, was December 31, 1876, and the assignees were appointed July 28, 1876, that is several months before the ten years bar was completed, and according to the authorities cited, they had two years from August 11, 1876, in which to sue and their suit was brought within the two years.

But as matter of law, the statute is to be held as having begun to run only from the date on which the deed was recorded, to-wit: March, 1872, for it was not until then that Warren's possession became adverse.

Appellees have taken proof to show that the value of the lands is far greater than the consideration of ten dollars recited in the deed—in fact that the ten dollars is a mere nominal consideration—this would be the inference in the absence of proof.

Bump on Fraud. Conv. p. 303.
Felder v. Harper, 12 Ala. 612.

But simply by way of precaution appellees have examined three witnesses, and they all concur as to the quality and character of the lands—that its location, soil, surroundings, &c., make it a valuable tract, having the advantages of a public road, railroad and river landing all combined, and also of good and suitable improvements. The highest valuation put on the property by the witnesses is ten dollars per acre, and the bill and answer both show that there are 1,056 acres in the tract. Either of these estimates abundantly answers the purpose and establishes conclusively that the ten dollars recited as the consideration in the deed is merely a nominal consideration.

The proof also shows that the possession of Warren and wife did not become open, notorious and adverse until long after the deed was made—but at what time does not appear, except by the date of the recording of the deed, which was in March, 1872. The burthen of proof as to the statute of limitations was on Warren and wife to show that their open, notorious and adverse holding begun ten years before this suit was brought. They failed to make such proof, but appellees show by witnesses living on neighboring lands that no visible change of possession occurred until long after the date of the deed. With the proof in this condition the court properly held that the possession of Warren and wife was not adverse until the deed was recorded in March, 1872, and that, therefore, the statute did not begin to run until then.

It was insisted by appellant's counsel in the court below, and we presume will be here, that this is not an action to recover land and that, therefore, the ten years statute of limitations does not apply, but that this is an action to enforce the collection of a debt, and that the six years statute of limitations applies. We do not assent to this proposition, but if it be admitted for argument sake, the result is not different. The bill expressly shows that the debt due to R. M. Kilbourn is evidenced by a note dated December 1st, 1866, and that this note bears a credit of $9.30 paid on it September 1, 1873—the six years statute, then, would run from this payment, and that would bring it to September, 1879, a period long subsequent to the date on which the bill was filed.

The other debts set up in the bill are all of a fiduciary character and were due to minors and married women as against whom the statute did not run. When the bill avers, as it does, that these parties are minors and married women, this shows *prima facie* that the statute did not run against them, and if their disabilities have been removed it devolved upon defendants as part of their defense to show it by averment and proof. So far from doing that they admit in their answer the allegations of the bill.

Upon the case made by the bill, therefore, and also under the proof, it is immaterial whether the six years or the ten years statute applies, the remedy was not barred at the time of suit. There can be no doubt, though, that the ten years statute is the one that applies if any does. The theory of the suit is that the deed is void, and being void, the title to the land, on Kennedy's bankruptcy, passed to his assignees, and this suit is brought *to recover the land* and to sell it as assets, and being *a suit to recover land* the ten years statute must govern.

Pratt v. Curtis, 6 Bank. Reg. 139.

In regard to the rule of construction to be adopted by this court, we refer to the following additional authorities:

"But in construing the statutes of a State on which land titles depend infinite mischief would ensue, should this court observe a different rule from that which has long been established in the State, the court yields the construction which would be put on the words of the act, to that which the courts of the State have put on it, and on which many titles may probably depend."

Sedgwick on stat. and const. law; No. 9 Second ed. (Pomeroy's), p. 368.

It would be injurious to the citizens of a State to have two rules of property. Such a course by the courts of the Union would produce unfortunate conflicts and encourage litigation.

Ibid, p. 369.

Every statute *affecting the tenure of real property in a State*, whether public or private, is certainly in some sense a part of the *local law*.

Ibid, p. 370.

In Loyd v. Fulton, 1 Otto Reps., p. 479, this court construed the statute of frauds adopted by the State of Georgia, which was the old English statute (just as it is in Alabama), and held that the construction put upon the statute by the supreme court of Georgia would have to be applied by it (the supreme court of the U. S.), because that construction was a rule of property there. It is true that the construction given by the Georgia courts is different from that given by the Alabama courts, and that it accorded with the views of this court upon the same subject, but it was not for this reason that this court followed that construction; it was because, as they say, "this court is bound to apply it in the case in hand as if we were sitting as a local court in that State."

1 Otto, p. 485.

Pratt v. Curtis, 6 B. R. 142.

These cases are both based upon the same English satute as that in Georgia and in this State and are a full answer to appellants' position that the United States courts will not follow the construction which the State supreme court puts on a statute that is declaratory of the common law, and show that it *will follow* such construction where it has become a rule of property.

It is too early to anticipate at this stage of the proceedings what rule will be adopted for distributing this fund if the property should be sold by decree in this cause. Whether or not creditors whose claims arose subsequent to the making of the deed will be entitled to share in the fund, or whether the surplus after paying antecedent debts shall go to Warren and wife, are questions which will arise after the fund is brought into court for distribution. If, however, that question has any influence upon the decision of this case, as appellant's counsel seems to suppose, the rule seems to be that *after the deed is vacated* at the instance of existing creditors, that then the creditors generally can share in the fund.

Bump on fraudulent conveyances, p. 329, title "Remedies."

Also, p. 329, note 4.

Pratt v. Curtis, 6 Bank. Reg., p. 139.

This last case is, of itself, sufficient to sustain the decree of the court below.

It fully sustains the right of the assignees to file the bill, and further shows it to have been their duty to do so, and that they were the only parties who could properly do so, and that the fact of their having the right to proceed at law did not take away the remedy in equity—this is also the law in Alabama. In fact, it is doubtful if an action at law could have been maintained because of the recital in the deed of a valuable consideration.

In the light of this, and other decisions that could be cited to the same effect, it would appear that the suggestion of the distinguished counsel for appellee that these assignees were influenced by mercenary motives in bringing the suit is gratuitous.

Furthermore, the intimation that this litigation was not instituted until the time had arrived at which the estate should have been finally settled is equally without foundation. Enough appears from the answers of the appellants to show that this was a large estate involving interests in manufacturing establishments and other interests that would require time to wind up, and this court, in the absence of anything in the record showing to the contrary, will presume that the assignees have done their duty rather than assume, with appellant's counsel, that they have been actuated by selfish or mercenary motives; it is likewise to be presumed that the court in which they are administering the trust would not tolerate any unnecessary delay or encourage them in selfish objects.

In respect to the form of the final decree it is only necessary to remark that its legal operation and effect is simply to set aside and annul the deed of December, 1866, as *to the parties to the suit*, and it will be deemed and taken as if it contained those words. In that portion of it quoted by appellant's counsel, on page 6 of his printed argument, a clerical error occurs by the omission of the word "and" after the word "creditors" and just before the words, "of the said Vernon K. Warren and Edward Warren," the sentence, as will appear from the original decree, being as follows: "Subject to distribution among the creditors of said bankrupt, under the orders and direction of this court, according to the respective rights and priorities of such creditors *and* of the said Vernon K. Warren and Edward Warren." We assume that the economical views which appellant's counsel appears from his brief to entertain will induce him to waive the necessity of a correction of this error and thus relieve the case of the expense of a formal correction of the error. If, however, we are mistaken in this we will rely upon this slight error being corrected by this court in its own decree or by proper directions to the court below.

The limited time in which this argument has been prepared and printed has not admitted of as careful and full reply to all the propositions contained in the able argument of appellant's counsel as we would have desired, but we rely with confidence on the authorities cited as sustaining the decree of the court below.

M. L. WOODS,
WM. S. THORINGTON,
Attorneys for Appellees.